Supreme Court, U.S.
FILED
Mar 31
APR 05 1993
OFFICE

92-1605

NO. ____

IN THE

Supreme Court of the United States

October Term, 1992

PATRICK G. WOOSLEY

vs.

STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. In *sua sponte* overruling uniform California authority approving class claims for refund of taxes, did the California Supreme Court create an untenable and inadequate state ground for denying members of the Petitioner class herein the protection of this Court's settled anti-discrimination Commerce Clause precedent?

2. Where a State intentionally discriminates against interstate commerce, does the Due Process Clause permit retroactive application of a new procedural condition precedent to block relief from the facial discrimination?

3. Did the California Court's prohibition of class claims for refund (1) deprive the Petitioner class of due process by denying them meaningful backward looking relief and (2) violate the principles of *Felder v. Casey*, 487 U.S. 131 (1985) because the prohibition required them to seek individual redress from an administrative agency that was, pursuant to the State's Constitution, expressly prohibited from granting the relief sought?

4. Is it an undue burden on interstate commerce for a State to collect a fee which it knows to discriminate against interstate commerce and require the targets of the discrimination to file individual claims for refund, particularly to an agency which does not have the power to rule a statute unconstitutional?

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No. _____

IN THE SUPREME COURT

Of The

UNITED STATES

October Term, 1992

PATRICK G. WOOSLEY,
on behalf of himself and all others
similarly situated,[1]
Petitioner, vs.

STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES AND STATE BOARD OF CONTROL,
agencies of said State,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI

Petitioner respectfully requests this Court to issue a writ of certiorari to review the judgment of the Supreme Court of California, or in the alternative, to reverse summarily the California court's judgment.

OPINIONS BELOW

The opinion of the Supreme Court of California (Appendix A, 1a) is reported at 3 Cal.4th 758 (1992). The court's order denying a rehearing (App.B, 55a) is repro-

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1. Patrick G. Woosley, f/k/a Charles Patrick Woosley, is the class representative for a class certified by the California Superior Court and estimated in 1985 to contain approximately three million people. The members of the class have not been identified by name. In response to Rule 29.1, Woosley has no parent or subsidiary companies. The California State Board of Equalization was also a party below.

duced in 1993 California Advance Sheets, No. 6, Supreme Court Minutes, page 13. All of the opinion of the Court of Appeal of the State of California in and for the Second Appellate District (App.C, 56a) except part III was originally reported at 217 Cal.App.3d 888 (1990); the case was renumbered several times and last published at 6 Cal.App.4th 343 to permit tracking of the case pending review by the California Supreme Court. Part III is unpublished. Pursuant to California Rules of Court, Rule 976(d), the opinion of the Court of Appeal was vacated by the California Supreme Court's grant of review May 31, 1990. The Statement of Decision (covering liability) by the California Superior Court (App.D, 118a), its Statement Of Decision Granting Plaintiff's Motion For Class Certification (App.E, 209a) and its Judgment (App.F, 267a) are unpublished.

JURISDICTION

The California Supreme Court's decision was filed on October 26, 1992, and a timely motion for rehearing (App. H, 272a) was denied on December 31, 1992 (App.B). Jurisdiction of the Court is invoked pursuant to 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the following constitutional and statutory provisions are reproduced in Appendix G, page 269a: Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause); United States Constitution, Fourteenth Amendment, section 1 (the Due Process Clause); California Constitution article XIII, section 32; and California Constitution, article III, § 3.5; California Government Code section 910, California Revenue and Taxation Code section 10901 and California Vehicle Code section 42231-42232.

STATEMENT OF THE CASE

This case raises the question of whether a state Supreme Court can retroactively "discover" a state procedural rule in order to deny relief to a large class of vehicle owners who were subjected to discriminatory vehicle license fees found by all courts below facially to violate the Commerce Clause of the United States Constitution.

Starting in 1967 the California Department of Motor Vehicles ("DMV") began collecting yearly vehicle license fees in a manner that knowingly discriminated against vehicles purchased in interstate commerce. The difference in treatment resulted in the Petitioner individually paying a vehicle license fee 200 times greater than he would have paid had he purchased an identical California vehicle. In 1985 the trial court found the average overcharge per vehicle of the estimated three million vehicles involved at $80-$100.

When this dispute began, there was recent California Supreme Court (hereinafter "California Court") authority approving class claims for refund in a tort action against a governmental entity, another Supreme Court case approving a class action for return of sales taxes, and numerous Court of Appeal decisions approving class claims for refund of various taxes. There was no California authority to the contrary.

Petitioner paid the higher fee, filed a claim for refund on behalf of himself and all similarly situated payors of the challenged fee, and sued for refund because California does not permit any pre-payment challenges to the fee. Petitioner's class claim for refund was filed in 1977, suit was filed in 1978, and favorable rulings on liability and class certification were entered in 1983 and 1984 respectively. Judgment was entered July 1, 1985. The judgment, class certification and findings were affirmed by the Court of

Appeal in 1990. The trial court specifically found, and the Court of Appeal affirmed, that Woosley had exhausted all administrative remedies on behalf of the class. The lower courts ordered refunds of the overcharges to all California taxpayers who had paid the unconstitutional fees.

In addition to the arguments it had advanced below, the DMV vigorously argued in the California Court that the State could not afford to return the illegally exacted fees. However, at no time in the scheduled briefing or in oral argument to the California Court did any party or any member of the court raise the issue of whether class claims for refunds were an appropriate procedural mechanism for payors of vehicle license fees who had been unconstitutionally deprived of their property.

Three weeks after oral argument, the California Court *sua sponte* issued a succinct order requesting additional briefs on the propriety of class claims. The order stated, in its entirety:

> The order of submission issued on June 2, 1992, is hereby vacated. [¶] The parties are directed to file supplemental briefs on the issue of whether a class claim may be used to seek a refund of taxes. [¶] The supplemental briefs shall be filed no later than July 24, 1992. Any replies thereto shall be filed no later than August 3, 1992.

Although multiple briefs were filed by the parties and *amici curiae* on this subject, nevertheless, much of the California Court's logic was unanticipated in any brief. The briefs argued the untenability of statutory and constitutional construction, and violation of the Commerce Clause, Due Process Clause, prospectivity-only and the Civil Rights Act. See, *e.g.* Appendix I, pages 289a-291a, 296a-302a, 302a-308a, 312a-317a and 308a-309a. Thereafter, on Oc-

tober 26, 1992 the California Court issued its opinion and modified it on December 31, 1992.

The California Court held that the subject license fee statute violated the Commerce Clause, but ruled that only payors of vehicle license fees who had individually exhausted their administrative remedies by filing timely *individual* refund claims with DMV could be members of the class.

The California Court created this state law ground to deny refunds to people whose property had been taken in knowing violation of the federal Constitution. The California Court retroactively imposed a procedural requirement that was previously unrecognized in, or foreshadowed by, the jurisprudence of the State or the practices and procedures of its agencies. In short, the retroactive imposition of a previously unknown procedural requirement came as a complete surprise not only to the petitioner class members, but also to the defendant state agencies.

The effect of this ruling is that only those purchasers of out-of-state vehicles who recognized that the California fee scheme violated the Commerce Clause and filed refund claims on that basis are eligible for refunds as members of the class. The practical effect of this ruling is that no one other than Woosley will receive a refund herein and the State will be unjustly enriched with the fruits of its unconstitutional exactions.

REASONS WHY THE WRIT SHOULD BE GRANTED

As a consequence of the coincidental combination of the recent economic downturn and the "taxpayer revolt," many of the states in this country are facing difficult fiscal problems. Some states, such as California here, are misconstruing this Court's holding in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990) ("*McKesson*"), which recognized the fiscal problems facing

the states and indicated the court's willingness to sanction some efforts by the states to protect the public fisc.

This Court should now address what if any limits there are on the lengths to which the states may go in their efforts to protect the State's treasury.

Unless prevented by this Court, California has designed the perfect scheme to discourage the exercise of federal constitutional rights and to illegally fill its coffers. First, the Legislature enacted a fee on the exercise of a federal right. Second, the Legislature prohibited prepayment challenge to the fee. Third, the State required DMV to continue to follow the unconstitutional statute until it was ruled unconstitutional by an appellate court. Fourth, the State relied on the federal Tax Injunction Act (28 U.S.C § 1341) to keep the dispute out of the speedy and unbiased federal courts. Fifth, the State relied on its congested court system to delay the litigation for many years. Sixth, the State appealed the case all the way to its Supreme Court, losing the substantive constitutional issue at every stage, and then argued that it had spent the money from the illegal fee that it continued to collect all along and could not afford to pay it back. Finally, the State Supreme Court concocted a new procedural requirement to avoid refunds and applied it retroactively. Unless prohibited by this Court the result will be that: California will have succeeded in discouraging the exercise of a fundamental constitutional right for at least 25 years, is hundreds of millions of dollars richer, and will have placed a chilling effect on any future challenges to any future schemes burdening the exercise of federal rights.

If this Court does not invalidate this scheme, California and other states may repeat similar strategies, and the Commerce Clause will become an empty shell for individual taxpayers with modest claims. The states may arbitrarily tax -- and thus discourage -- the exercise of any fed-

eral right which is not politically popular enough to be foreclosed by the local political process.

This Court's decision in *McKesson, supra,* 496 U.S. at 45 and 50, empathized with the fiscal problems facing the states and indicated the Court's willingness to sanction reasonable efforts *in the future* by the States to protect their treasuries with reasonable procedural protections enacted before the dispute began. *Id.* at 24, n. 4. This Court stated:

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to *future cases*. The state's ability *in the future* to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighted against its constitutional obligation to provide relief for an unlawful tax. 496 U.S. at 45. (Emphasis added.)
>
> * * *
>
> And *in the future*, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation. *Id.* at 50. (Emphasis added).

Unfortunately, California and other states have ignored the "in the future" qualification in *McKesson* and interpreted this Court's empathy as a *carte blanche* to retroactively impose unreasonable procedural barriers to vindication of constitutional rights; even in cases such as the instant one, where the State knew it was discriminating against interstate commerce.

Accordingly, this Court should (1) stress the prospective-only requirement for new procedural barriers, (2) address the limits on the lengths to which the States may go in their efforts to protect their treasury at the expense of inter-

state commerce and other constitutional rights, and (3) in tax cases involving constitutional claims, this Court should adopt a test of strict scrutiny to apply to any procedural barrier (including circumscription or elimination of class relief) erected by a State to determine if the purpose or effect of the procedural barrier is to deny meaningful post-deprivation relief to individuals whose constitutional rights have been violated.

It is not practical to fight mass production discrimination against interstate commerce, such as this, with the stone age tool of individual claims for refund. The average class member recovery in the instant case was found by the trial court to be approximately $80. The case took 14-1/2 years in the state courts, without any reversals, remands or retrials. In the process, petitioner and his counsel spent thousands of hours, and tens of thousands of dollars in out-of-pocket costs to successfully protect the Commerce Clause right at every stage. If limited to individual claims for refunds, the individual taxpayer with a modest claim is poorly armed to fight a constitutional battle against systemic, mass production discrimination.

This Court underscored the public policy considerations favoring class actions in *Phillips Petroleum Co. V. Shutts*, 472 U.S. 797 (1985), demonstrating its concern for the plight of the individual with a "small claim," or a lack of familiarity with the law. *Id.* at 809.

Were it not for a coincidence, California would have gotten away with its scheme indefinitely. Calculation of the vehicle license fee is obscure; few people outside of the DMV understand it, and many of the targets of this treatment were new residents who did not have a frame of reference to realize that they were being dramatically overcharged. Petitioner Woosley is an attorney, a certified tax specialist and an automobile collector. Because of the coincidental combination of his professional background and

his hobby, he discovered the illegal scheme knowingly practiced by California since 1967 and recognized it for what it was, a knowing and willful violation of the Commerce Clause.

I. THE CALIFORNIA SUPREME COURT'S RETROACTIVE PROHIBITION OF CLASS CLAIMS FOR REFUND IS AN UNTENABLE STATE GROUND FOR AVOIDING THIS COURTS SETTLED PRECEDENT PROHIBITING FACIAL DISCRIMINATION AGAINST INTERSTATE COMMERCE.

By manufacturing an untenable retroactive state procedural requirement, the California Court avoided giving the members of the certified class the benefit of its substantive holding -- that California's discriminatory vehicle license fee system violated the Commerce Clause. As this Court said in *Ward v. Board of Commissioners of Love County*, 253 U.S. 17, 22-23 (1920), this Court must reject state grounds that lack "fair or substantial support," otherwise "[this Court's] power to review easily may be avoided." There, this Court found untenable the County's contention that Indians had paid taxes voluntarily and were thus barred from obtaining refunds of the taxes collected in violation of a federal exemption.

> The Supreme Court should undertake to ensure that in seeking to assert a federal right litigants are neither surprised by the creation of novel procedural doctrines, nor confounded by procedures so complex that ordinary competent attorneys cannot secure determination of the right. 16 C. Wright, Miller, Cooper & Gressman, Federal Practice and Procedure § 4027, p. 737 (1977).

In ruling that class claims for tax refunds were not permitted in California, the California Court first found that California Constitution article XIII, section 32 required

taxpayers to follow whatever precise procedures are specified by the Legislature for obtaining refunds. The Court then found that notwithstanding the long standing public policy favoring class actions embraced in Section 382 of the California Code of Civil Procedure, the Legislature did not intend to allow class claims for tax refunds. Neither holding is tenable. California Constitution article XIII, section 32 provides:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be *provided by the Legislature*. (Emphasis added.)

The goal of section 32 is to assure the continued flow of money to government while taxes are being challenged. *Pacific Gas & Electric Co. v. State Board of Equalization*, 27 Cal.3d at 280, 283, (1980); *Modern Barber Collage v. Cal. Emp. Stab. Com.*, 31 Cal.2d 720, 731-32 (1948).

The emphasized language from Article XIII, section 32 quoted above was changed from "provided by law" to "provided by the Legislature" in 1974 as part of a wholesale redrafting of article XIII. The legislative history shows that the redrafting of the emphasized language in section 32 was meant as a nonsubstantive change.

The Senate Committee on Revenue and Taxation analysis states that section 32:

> Forbids judicial restraint on collection of taxes; requires payment of tax prior to contesting its legality. (Broadened to apply to all state taxes; not just article XIII taxes.) Senate Committee on Revenue and Taxation Report on ACA 32 (Gonsalves) as amended April 22, 1974, p. 708.

The language change from "provided by law" to "provided by the Legislature" was mentioned nowhere in the legislative history as a change. The constitutional revisions that included the subject language changes were submitted to California voters for adoption pursuant to California's "proposition" practice. The voter pamphlet provided by the State said that the purpose of the amendment was not to change the tax structure *but to make it more readable*. The amendment was described as "non- controversial."

> This means that the essence of the present article is retained, but made more understandable. [¶] There is no known opposition to this Proposition. California Voters Pamphlet, General Election November 5, 1974, p. 31.

No significant state or local revenue effect was expected. *Id.* at p. 30. There was not one word to suggest an intent to make the refund process more difficult, or to require a specific legislative enactment before class claims could be cognizable.

The California Court articulated no response to this legislative history, the evolution of the provision, or the arguments that the 1974 change was not meant to impose additional barriers to postpayment relief. The Court held, however, that the "provided by the Legislature" language of section 32 was *intended* as a strict limitation on the manner in which claims for refund were made. The court's total articulated analysis was:

> This constitutional limitation rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues. (See *State Bd. of Equal-*

> *ization v. Superior Court* (1985) 39 Cal.3d 633, 638.) App.A at 43a.
>
> * * *
>
> In sum, article XIII, section 32, of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature. App.A at 48a.

Because there was no class administrative claim procedure expressly provided by the Legislature, the Court concluded that the procedure did not exist, notwithstanding that the State's own agencies thought class claims were permissible and that every extant judicial opinion in California recognized their existence.

The California Court turned this Court's empathy in *McKesson*, *supra*, for problems of temporary disruption in a State's collections into a right to keep unconstitutional collections permanently based on the State's need for money. *McKesson* is clearly to the contrary. 496 U.S. at 44-52.

Another flaw in the California Court's statutory analysis that demonstrates that it is untenable is the court's assumption that the taxpayers' right to a refund of taxes is granted by the claim provisions. App.A at 44a. Where predeprivation remedies are not available (such as for vehicle license fees) refund rights are created by the Due Process Clause. A state's statutory scheme may only restrict those rights in a manner that is both reasonable and consistent with due process. *McKesson, supra,* 496 U.S. at 50-51 (1990); *Ward v. Love County, supra*, 253 U.S. at 24.

The California Court's analysis of the "manner provided by the Legislature" language is demonstrably untenable for another reason. The California Court acknowledged that the Revenue and Taxation Code which imposes the fee does not restrict who can file the claim for refund or its form,

but ruled that the Legislature intended to prohibit class claims anyway. In an attempt to rationalize a distinction with its precedent in *City of San Jose v. Superior Court*, 12 Cal.3d 447 (1974), the California Court said that the statutory language in the Government Code relied on by the *San Jose* Court to support the existence of class claims against governmental entities differed materially from the language in the Vehicle Code, which the Court said did not permit class claims.

The Government Code language which permitted class claims was "A claim shall be presented by the claimant *or by a person acting on his or her behalf* ...." The language from the Vehicle Code required that claims be filed by "the person who has paid the erroneous or excessive fee or penalty, *or his agent on his behalf.*" The Court reaffirmed that the Government Code language permitted a class representative to make a class claim, but that the use of the word "agent" in the Vehicle Code prohibited anyone from making a claim for refund on behalf of someone else without their express permission. The Court ruled that class representatives did not thus qualify (App.A at 43a-44a), even though standard class action procedures permit anyone to opt out who does not wish to be represented in a class action. This distinction is untenable. It is reminiscent of the admonition vs. instruction argument in *James v. Kentucky*, 466 U.S. 341, 348-349 (1984) or the argument about the difference between mandamus and certiorari in *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 454-458 (1958). The court's rationale is also far afield of any argument suggested by any of the parties.

II. THE CALIFORNIA SUPREME COURT'S RETROACTIVE PROHIBITION OF CLASS CLAIMS FOR REFUND VIOLATES THE DUE PROCESS CLAUSE.

The retroactive procedural requirement created by the California Supreme Court assures that only taxpayers who recognized the constitutional violation and filed timely individual claims for refund are entitled to refunds as members of the class Woosley represents. The effect of that procedural requirement in situations such as the instant case where individual activities rather than organized business activities are being discriminated against is, for all practical purposes, to limit the protection of the Commerce Clause to constitutional scholars and tax lawyers.

The California Court's decision is a transparent attempt to avoid California's obligation under due process to either refund taxes collected under a state statute that was unconstitutional under settled Commerce Clause precedent, or to otherwise equalize the treatment of the victims of unlawful discrimination. Imposition of a tax is a "deprivation of property." *McKesson, supra,* 496 U.S. at 36. The Court's retroactive imposition of a procedural requirement on class members that effectively denies them relief for the unconstitutional taking directly conflicts with this Court's opinions on retroactivity, including *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *American Trucking Assns. v. Smith*, 496 U.S. 167 (1990).

One area where prospective-only overruling is compelling and common is for procedural traps. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (statute of limitations); *England v. Medical Examiners*, 375 U.S. 411, 422 (1964) (litigation of federal claims in state court in reliance on former rule permitting return to federal court, overruling decision not applied retroactively); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 679 (1930) (due process

barred Missouri Supreme Court from retroactively creating a mandatory administrative exhaustion requirement); and of course, *Chevron, supra* (new statute of limitations applied prospectively only). Concerning statutes of limitations generally, see *Lampf, Pleva, Lipkind et al v. Gilbertson*, ___ U.S. ___ (1991); 111 S.Ct. 2773, 2786-2787 (O'Connor, J., dissenting):

> Until today, however, the Court has *never* applied a new limitations period retroactively to the very case in which it announced the new rule so as to bar an action that was timely under binding Circuit precedent. Our practice has been instead to evaluate the case at hand by the old limitations period, reserving the new rule for application in future cases. *Id.* at 2786, emphasis in original.

After the *Lampf* decision, Congress changed the statute to follow the dissent. Pub.L. No. 102-242, § 476, 105 Stat. 2236; 15 U.S.C. § 78aa-1.

Application of *Chevron's* three prong test cries out for prospective-only application of California's new procedural requirement.

Applying *Chevron* (supra, 404 U.S. at 106), the rule requiring individual class claims as a condition precedent to membership in a class easily fits the criteria of the first test of nonretroactivity because the California Court established "a new principle of law, ... by overruling clear past precedent on which litigants may have relied ...." Despite the California Court's statement that it was not creating new law (App.A at 50a), the court's opinion overruled every California opinion that had ever previously considered the issue. The Court specifically overruled *Schoderbek v. Carlson*, 113 Cal.App.3d 1029, 1033 (1980); *Lattin v. Franchise Tax Board*, 75 Cal.App.3d 377, 381 (1977); *Santa Barbara Optical Co. v. State Bd. of Equalization*, 47

Cal.App.3d 244, 249 (1975); and, *Javor v. State Bd. of Equalization*, 73 Cal.App.3d 939, 948 (1977). App.A p. 47a. Each and every one of those cases had relied on the State Supreme Court's opinion in *City of San Jose v. Superior Court*, 12 Cal.3d 447 (1974), which held that class claims against governmental entities were permitted. The California Court fashioned a rationale out of whole cloth, and retroactively eliminated the class claim procedural mechanism relied upon by the class. The Due Process Clause cannot abide this retroactive action.

Further, widespread reliance on the clear past precedent is shown, first, by *Andrew S. Arena, Inc. v. Superior Court* (Ariz. 1990) 788 P.2d 1174, where the Arizona Supreme Court looked to *City of San Jose*, *supra*, and *Santa Barbara Optical, supra*. in approving class claims and class actions for tax refunds in Arizona, holding: "We agree with the California courts, which hold that the claims statutes were not intended to thwart class relief." *Id.*, at 1177. Second, the California Supreme Court's opinion implicitly acknowledges the reliance on clear past precedent (App.A at 41a): "Apparently considering the question to be settled, the state has not questioned whether a class claim may be filed seeking refunds of vehicle license fees ...." Finally, the *amici curiae* briefs filed in the California Court when the novel issue was first raised show reliance upon the clear precedent. When the State Supreme Court raised the issue of the propriety of class claims for tax refunds, numerous taxpayer groups filed *amici* briefs vociferously arguing that they had relied on the clear past precedent of the California courts approving class claims for tax refunds.

Applying the second prong of *Chevron*, the prior history of, and legitimate purposes of, the new rule against class claims for tax refunds would not be furthered by retroactive application. The identified purpose of the rule announced by the California Court would be to save the State the cost

of identifying and notifying class members. App.A at 46a-47a. Here, however, liability has been determined and the costs of identification and notice will come out of the common fund. The only purpose that would be served by a retroactive application of the new rule is to enrich the State in a manner fundamentally at odds with the purposes of the Commerce Clause. One of the purposes of retroactive application of a rule is to encourage future litigants to respect reasonably foreseeable rules of litigation, but retrospective application here could serve no such purpose. There was no way of forecasting that class claims would be prohibited by the California Court 15 years after they were filed.

Finally, under *Chevron's* third prong (404 U.S. at 107) the equities strongly require prospective-only application of this new procedural requirement because (1) it was totally unanticipated by any of the parties, and (2) retroactive application would produce a "substantial inequitable result" and would result in an "injustice or hardship" to the Petitioner class and a windfall to the State. The DMV knew it was discriminating against out-of-state vehicles, and this Court's settled precedent against facial discrimination has never been subject to anything but a frivolous challenge. A "substantial inequitable result" is guaranteed here because the California Court also ruled that no notice need be given to putative class members that they are no longer members of the class and that they must now proceed alone to recover the unconstitutional exactions. App.A at 49a-50a. The inequity of this ruling is made stridently clear when compared with the public policy considerations adhered to by this Court in *Phillips Petroleum Inc. v. Shutts*, *supra*, which held that the Fourteenth Amendment required that state courts provide class members with procedural due process, including notice and the opportunity to be heard. In stark contrast, the class members are innocent victims of

an unconstitutional scheme. The equities strongly favor the class.

Further, in the courts below California relied on blatantly inappropriate "equities" by arguing that it cannot afford to return the money it knowingly took in violation of the Commerce clause. However, its financial interest does not justify a refusal to provide relief. *McKesson, supra*, 496 U.S. at 50. "There simply is nothing 'inequitable' or wrong about ordering that the State not pick a taxpayer's pocket or in requiring it to return the money when it is caught doing so." *Swanson v. North Carolina*, 407 S.E.2d 791, 797 (N.C. 1991 cert. pending No. 91-1436) (Mitchell, J., dissenting).

The State cannot be free to pass unconstitutional laws, to exact tribute from taxpayers in a discriminatory manner, to spend the money, and then, when caught, to plead poverty. During the 17 year history of this dispute California has enjoyed periods of fiscal abundance and suffered periods of fiscal distress. At one point the State enjoyed a surplus of in excess of $1 billion, which it refunded to its citizens. It should not and cannot be the law of this land that the Commerce Clause only protects the nation's citizens during times of abundance. The State's financial concerns permit it to prohibit predeprivation relief to targets of discrimination. The State's financial concerns do not permit it to effectively eliminate all relief.

A comparison of the equities of this case to the equities of some cases in which this Court has provided prospective-only rulings under the inequity prong of the *Chevron* test (or comparable standards) shows that equity favors prospective-only application here. See, *Lemon v. Curtsman*, 411 U.S. 192 (1978) (refused to apply retroactively a decision invalidating a statute authorizing reimbursement to sectarian schools for educational services provided); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (refused to retroactively

apply a decision holding unconstitutional a statute permitting only property owners to vote in certain bond elections); *Northern Pipeline Construction Co. v. Maritime Pipeline Co.*, 458 U.S. 50, 87-88 (1982) (holding the Bankruptcy Act of 1980 unconstitutional prospectively-only because of the substantial injustice and hardship on litigants who relied on the statute); and *Los Angles Department of Water and Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (ruling that city's employee benefit plan violated Civil Rights Act applied prospectively because of "devastating" effect retroactivity would have on innocent employees).

III. THE CALIFORNIA COURT'S DETERMINATION THAT CLASS CLAIMS TO RECOVER UNCONSTITUTIONAL EXACTIONS ARE NOT PERMITTED IS REPUGNANT TO DUE PROCESS AND SHOULD NOT BE PERMITTED, EVEN PROSPECTIVELY.

As demonstrated above, the retroactive application of a new rule against class claims for tax refunds violates the Due Process Clause. Petitioner also submits that, whether applied retroactively or prospectively, the California Court's determination that class claims to recover unconstitutionally exacted taxes are not permitted is, under the facts and circumstances of this case, at odds with the requirements of due process.

When a State sets up a mass production approach to overcharge people and a class claim for refund procedure is practical, it would violate due process to require individual claims for refund, even if the requirement were not retroactive.

The Due Process Clause forbids the imposition of a tax without due process. *McKesson, supra,* 496 U.S. at 36 (1990). *Mathews v. Eldridge* (1975) 424 U.S. 319 (1976)

("*Mathews*"), sets forth the considerations to be weighed to determine whether procedural mechanisms provide due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (Citation omitted.) *Mathews v. Eldridge*, 424 U.S. at 335.

The private interests affected are: the class members' right to enjoy the fruits of interstate commerce, the right to move to California and property rights in their money which the State seeks to keep. The right to engage in interstate commerce is a personal right. *Dennis v. Higgins*, __ U.S. __, 111 S.Ct. 865, 871-72 (1991). Their membership in the class is a "chose in action" and property. *Shutts, supra*, 472 U.S. at 804. Thus, the first consideration of *Mathews* is strongly in favor of class claims here.

Denial of class procedures where class procedures are practical would, in many cases, mean that the States would have a safe harbor in which they could ignore people's rights. This risk is particularly dangerous where the tax is on protected subject matter about which the taxpayer has some discretion, such as interstate commerce. Burdensome procedural barriers can discourage interstate commerce just as effectively as substantive barriers. As this Court recognized in *Shutts, supra*, 472 U.S. at 809:

> Class actions ... may permit the plaintiffs to pool claims that would be uneconomical to litigate individ-

> usually.... [M]ost of the plaintiffs would have no realistic day in court if a class action were not available.

Thus, the second consideration of *Mathews* favors class actions and class claims.

Turning to the third *Mathews* consideration, the State's legitimate interests are maintaining the integrity and respectability of the tax system so that there will be a high level of self-compliance, making any refunds in an efficient and orderly manner, avoiding surprise, and minimizing the cost *to DMV* of notice. A State intentionally taking advantage of its victims' lack of understanding is not proper. Once one discards the illegitimate objective of retaining money which belongs to the State's taxpayers, the third factor favors class claims as well. The fact that the State has spent the money has no relevance.

The integrity of the system is enhanced by class claims because every eligible person who can be found gets a refund, and discrimination is eliminated. The trial court carefully examined the inner workings of the DMV, how it would deal with a large number of individual claims for refund, and the efficiencies it could achieve with a class refund approach. App.E pp. 231a-262a. The court found that a class approach is the fairest and most efficient (231a), most of the work can be done with computers (245a), that court supervision is necessary (260a) and that a class process would be no more burdensome than a single individual relitigation (262a). The court reviewed the alternative forms of litigation, found a class proceeding beneficial and individual actions impractical. App.E at 256a-257a. The findings of fact by the trial court were affirmed by the Court of Appeal (App.C at 90) and accepted by the Supreme Court (App.A at 5a). A class claim also gives the State better notice of a possible serious fiscal problem than an individual claim.

This does not mean that class claims should be allowed for all taxes or in all circumstances. In tax cases involving constitutional claims, this Court should adopt a test of strict scrutiny to apply to any procedural barrier (including circumscription or elimination of class relief) erected by a State to determine if the purpose or effect of the procedural barrier is to deny meaningful post-deprivation relief to individuals whose constitutional rights have been violated.

IV. SINCE A PERSON IS EXCUSED FROM EVEN ATTEMPTING TO EXHAUST ADMINISTRATIVE REMEDIES IN PROTECTING CIVIL RIGHTS, PETITIONER'S GOOD FAITH ATTEMPT IS SUFFICIENT.

Petitioner submits that in the context of a constitutional deprivation of property the State cannot deny relief to a taxpayer so entitled solely because the taxpayer did not first seek relief from an administrative agency that, pursuant to the State's own constitution, had no power or authority to grant the relief.

Article III, section 3.5 of the California Constitution prohibits any state agency from determining that a state statute is unconstitutional. Accordingly, there is *no* real administrative remedy for an unconstitutional exaction. Even though the filing of administrative claims, whether individual or class, is a totally meaningless exercise when asserting a constitutional challenge, the California Court held that the failure of class members to file individual administrative claims was fatal to their membership in the class.

To impose meaningless requirements, such as requiring the taxpayer to adjudicate its constitutional challenge before a body that lacks jurisdiction to adjudicate constitutional challenges, unlawfully infringes the right of access to court when it is the only means of obtaining relief. See *Bodie v. Connecticut*, 401 U.S. 371, 376 (1971) (due process re-

quires states to waive court fees for indigents in divorce cases because only a court can give them a divorce).

Further, the federal Civil Rights Act, 42 U.S.C section 1983, excuses compliance with State administrative remedies in protecting federal rights. *Felder v. Casey*, 487 U.S. 131 (1988) requires that persons aggrieved because they have been deprived of federal constitutional rights have immediate access to the state courts:

> [T]here is simply no reason to suppose that Congress ... contemplated that those who sought to vindicate their federal rights in state courts could he required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries. *Id.* at 147. (Citations and footnotes omitted.)

See also, *Mathews v. Diaz*, 426 U.S. 67, 76-77 (1975); *Weinberger v. Soifi*, 422 U.S. 749, 763-765 (1974); *Gibson v. Berryhill*, 411 U.S. 564, 574 (1972); *McNeese v. Board of Education*, 373 U.S. 668, 674-675 (1963); *Montana Bank v. Yellowstone County*, 276 U.S. 499, 505 (1927) (exhaustion deemed re state tax on national bank). Yet, the California Court ruled that in order to protect their constitutional rights, each individual taxpayer must file an administrative claim with an agency that (1) has no authority to grant the relief sought, and (2) is the very agency that was perpetrating the illegal scheme.

V. THE CALIFORNIA COURT'S STRICT CONSTRUCTION OF CLAIM STATUTES CREATES AN UNCONSTITUTIONAL INCENTIVE TO PURCHASE CALIFORNIA MERCHANDISE.

In light of the fact that there was knowing, facial discrimination, the California Court's hyper-strict claim statute construction imposed an unreasonable burden on commerce, because purchasers of California vehicles were

spared the burdens DMV placed on purchasers of out-of-state vehicles: the time and expense of filing meaningless individual claims prior to litigation to achieve equality with purchasers of California vehicles.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, (1970) (invalidating statute that prohibiting growers from shipping produce before packing) set the standard:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Here, there is no legitimate local interest in enforcing burdensome procedures because the State knew that it was discriminating; the only goals were to favor in-state sellers and to collect illegal fees. Even if the local interest was superficially legitimate, the upheld findings of fact are that making refunds on a class basis would be much more efficient for the State than handling individual claims App.E at 234a-262a; and it is not reasonable to believe otherwise. While not as common as discrimination holdings, this Court has frequently found undue burden. *Edgar v. Mite Corp.*, 457 U.S. 624, 643 (1982) (struck down procedural barriers tilting the playing field in favor of local target companies in take-over battles); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-353 (1977) (statute prohibiting display of apple grades unreasonably burdened apples from Washington): *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 447 (1978) (trucking statute invalidated); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 668-669 (1981) (same).

Requiring the victims of Commerce Clause discrimination to seek redress from administrative agencies Constitu-

tionally bereft of authority to grant redress is itself an undue burden on interstate commerce.

CONCLUSION

This Court has consistently prohibited facial discrimination against interstate commerce. That effort will be for naught if this Court permits states to create untenable state grounds to avoid extending the constitutional protection to all who deserve it. Likewise, if this Court permits States to use unreasonable procedural devices to deny a fundamentally fair method of achieving meaningful relief, the constitutional protection of the Commerce Clause will be but a mirage to most people.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

Entered: October 26, 1992

No. S014557

CHARLES PATRICK WOOSLEY, Plaintiff and Appellant,

v.

THE STATE OF CALIFORNIA et al., Defendants and Appellants.

This is a class action challenging the practice of the State of California, acting through the Department of Motor Vehicles (DMV) and the State Board of Equalization (SBE), of charging annual vehicle-license fees and use taxes on passenger vehicles[1/] originally sold outside California that

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[1/] Vehicle Code section 465 defines "passenger vehicle" as "any motor vehicle, other than a motortruck or truck tractor, designed for carrying not more than 10 persons including the driver, and used or maintained for the transportation of persons.

were higher than the fees and taxes charged on similar vehicles first sold within the state.[2/] Also at issue is whether the DMV complied with the provisions of the California Administrative Procedure Act (Gov. Code, § 11340 et seq.) when, in November 1976, it altered its practice regarding the collection of use taxes for all vehicles, whether originally purchased in California or elsewhere. Finally, we decide whether the class claim filed in this case was authorized by statute. The state estimates that the current amount of the refund of vehicle-license fees and use taxes due under the judgment appealed from exceeds $ 1 billion.

For the reasons that follow, we hold the state violated the commerce clause of the United States Constitution by imposing vehicle-license fees and use taxes on vehicles originally sold outside California that were higher than the fees and taxes charged on similar vehicles first sold within the state. We also hold that even if the DMV failed to comply with the procedural requirements of the California Administrative Procedure Act when it altered its practice regarding collection of use taxes, the state

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The term 'passenger vehicle' shall include a housecar."

The term "vehicle" is used in this opinion to refer to "passenger vehicle" unless otherwise noted.

[2/] As explained below, the state has abandoned the practice challenged here due, in part, to several statutory amendments, but the state's former practice continues to affect the vehicle-license fees charged in some instances.

cannot be required on that basis to refund taxes which properly were due under state law.

Lastly, we hold the class claim filed in this case was not authorized by statute. That claim is valid only as to Woosley in his individual capacity. Although our ruling does not automatically preclude continuation of this suit as a class action, the class may include only persons who timely filed valid claims for refunds. Our holding will necessitate that the trial court, upon remand, redetermine whether an ascertainable class exists for purposes of a class action. Because the composition of the class is uncertain at this time, and because the issues raised by the parties have been fully litigated and are of substantial public importance, we proceed to address the issues which prompted our grant of review.

PROCEDURAL AND FACTUAL HISTORY

On February 23, 1976, plaintiff Charles Patrick Woosley, a California resident, purchased a 1936 Auburn supercharged, two-door speedster for $25,000 from a private party in North Carolina, and on November 12, 1976, he attempted to register the vehicle in California. Had Woosley purchased from a private party an identical automobile that originally had been sold in California, he would have been charged a vehicle-license fee[3/] of $2 and

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[3/] Revenue and Taxation Code section 10751 states: "A license fee is hereby imposed for the privilege of operating upon the public highways in this state any vehicle of a type which is subject to registration under the Vehicle Code ...." Vehicle Code section 4000, subdivision (a)(1), requires registration of "any

a use tax[4/] of $6 by the DMV. Because he purchased a vehicle that originally had been sold outside the state, however, the DMV used different methods of calculation, as explained below, and charged Woosley a license fee of $ 427 and a use tax of $ 1,500.[5/]

After filing claims for refunds on behalf of himself and all others similarly situated and pursuing administrative

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motor vehicle, trailer, semitrailer, pole or pipe dolly, logging dolly, or auxiliary dolly ...."

[4/] Revenue and Taxation Code section 6201 states, in pertinent part: "An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer ...."

[5/] These differences in the fee and the tax are particularly large in Woosley's case because both the fee and the tax were based on the purchase price of the vehicle. As explained below, had Woosley purchased the vehicle in California, the formula which would have been used to determine the fee and the tax would not have been based on the purchase price and, therefore, would not have reflected the value of the automobile as an antique.

Woosley could have registered his automobile as an "historic" vehicle and paid a lower vehicle-license fee. (Rev. & Tax. Code, § 10753.5.) Woosley points out, however, that a vehicle so designated has a limited use, because it must be "operated by a collector or hobbyist principally for purposes of exhibition and historic vehicle club activities." (Veh. Code, § 5004, subd. (f).)

remedies, without success, on July 20, 1978, Woosley filed a class action against the State of California, and several state agencies, including the DMV and the SBE, for a refund of license fees and use taxes, and for injunctive relief. By stipulation of the parties, the liability issues were bifurcated from the issues involving certification of the class, and the liability issues were tried first.

On December 27, 1983, following trial to the court, the court rendered its statement of decision on the issue of liability, and on November 13, 1984, rendered its statement of decision on the issues relating to class certification. On July 1, 1985, the court entered judgment in favor of plaintiff. After appeal by the state, the Court of Appeal affirmed the judgment. We granted the state's petition for review. Because neither party disputes the accuracy of the trial court's statements of decision, we accept the factual findings contained therein.

Vehicle-license Fees

An annual license fee is "imposed for the privilege of operating [a vehicle] upon the public highways in this state ...." (Rev. & Tax. Code, §10751.)[6/] The amount of this fee "shall be a sum equal to 2 percent of the market value of the vehicle as determined by the [DMV]." (§ 10752.)

As originally enacted in 1941, section 10753 directed

[6/] All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.

the DMV annually to "compile and publish a list showing the market values ... of each class of vehicle subject to the license fee ...." (Stats. 1941, ch. 40, § 1, pp. 605-606.) Upon registration, the DMV would use the information in this "rate book" to assign to the vehicle a classification code from which its market value would be determined for the year of the sale and all subsequent years, regardless of any change in ownership. The DMV did not differentiate between vehicles originally sold within California and those originally sold outside the state.

In 1948, section 10753 was amended to require the DMV to determine the market value of vehicles "upon the basis of the California delivered prices as established by the manufacturers or distributors in their selling agreements with authorized dealers as of the time the particular make and year model is first offered for sale in California ...." (Stats. 1948, ch. 26, § 2, p. 129.) Manufacturers informed the DMV of the "delivered price" on each model, and the DMV entered this information in its rate book. Using a method described in section 10753.2 (enacted in 1948), the market value of each vehicle was determined from this "delivered price" according to a depreciation schedule set forth in the statute.[7/] As before, the same classification

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[7/] Under section 10753.2 as originally enacted, the vehicle would be classified according to its "California delivered price" into one of a "series of classes successively set up in brackets having a spread of two hundred dollars ...." (Stats. 1948, ch. 26, § 3, p. 130.) The market value of the vehicle was defined as a stated percentage "of a sum equal to the middle point between the extremes of its class ...." (*Ibid.*) This percentage, which was set forth in a depreciation schedule, began at 85 percent "the year [the vehicle was] first sold to a consumer as a new vehicle" and

code was assigned to the vehicle and the same tax was imposed, whether the vehicle was purchased in California or elsewhere.

The DMV, however, urged the Legislature to alter the method for determining the vehicle-license fee, because manufacturers objected to supplying information regarding prices, thereby causing delays at the beginning of each model year in updating the rate book. In 1967, the Legislature amended section 10753 to require the DMV to determine the market value of vehicles by reference to "the California suggested base price" (§ 10753, subd. (a)), which was defined as "the retail price of the vehicle suggested by the manufacturer ... as reflected on the price listing affixed to the vehicle pursuant to the Federal Automobile Information Disclosure Act of 1958 ...." (§ 10753, subd. (g), as amended by Stats. 1967, ch. 435, § 1, pp. 1647-1648.) The "price listing" is commonly referred to as the "sticker price" of the vehicle.[8/] Section 10753 defined the California suggested base price to include "destination charge[s]" and the cost of statutorily required "emission control devices," but not the cost of factory-installed

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decreased over time to a minimum of 5 percent. *(ibid.)* The depreciation schedule has since been amended, most recently in 1991. (Stats. 1991, ch. 87, §§ 3, 4.)

[8/] This amendment applied solely to passenger vehicles.

"accessor[ies]" or "optional equipment."[9/] (§ 10753, subd. (g).) The statute further provided: "In the event the [DMV] is unable to ascertain the California suggested base price as herein defined ..., the [DMV] shall determine the market value upon the basis of the cost price to the purchaser of the vehicle as evidenced by a certificate of cost ...." (§10753, subd. (c).)

Consistently, the Legislature also amended section 10753.2, which, as described above, sets forth the depreciation schedule used in determining a vehicle's market value, to reflect that this process was based on "the California suggested base price, as defined above, of a vehicle or its cost price to the purchaser ...." (Stats. 1967, ch. 435, § 2, p. 1649.)

Based upon these amendments, the DMV ceased producing a rate book and began requiring dealers to provide, for each new vehicle sold in California, a "report of sale" listing the manufacturer's suggested retail price, destination charge, and the cost of emission-control devices as reflected by the "sticker" on the vehicle. As before, the DMV would use the information supplied by the dealer to assign to the vehicle a classification code from which its market value would be determined for the year of the sale and all subsequent years.

If a vehicle originally was sold in another state,

[9/] The DMV included the cost of accessories and optional equipment installed by the dealer. We need not, and do not, decide whether this was a correct interpretation of section 10753.

however, the DMV would not receive a "report of sale" from the dealer and thus could not assign a classification code. When the owner of such a vehicle attempted to register it in California, the DMV took the position that the "California suggested base price" could not be ascertained, and the DMV instead determined the market value of the vehicle based upon the "cost price to the purchaser," requiring the owner to produce a certificate of cost. The DMV required a certificate of cost in such circumstances even if, as to pre-1968 models, the vehicle was listed in the DMV rate-book or the original sticker price was available. This practice resulted in the imposition of significantly higher license fees for vehicles purchased outside the state than for those first sold in California, in part because the cost of factory-installed accessories and optional equipment was excluded from the suggested base price for vehicles originally purchased in California, but not from the actual cost of vehicles first purchased in other states.

The DMV's adoption of methods for determining the market value of vehicles originally purchased in California which differed from the methods applied to vehicles first sold elsewhere led the DMV also to adopt different methods of applying the depreciation schedule in section 10753.2. For vehicles originally purchased in California, the DMV used the vehicle's sticker price to determine its market value and applied the depreciation schedule, as directed by section 10753.2, subdivision (c), "starting with the year [the vehicle was] first sold to a consumer as a new vehicle, ..." (Stats. 1948, ch. 26, § 3, p. 130.)

For vehicles originally purchased outside the state, however, the market value of the vehicle was based upon its actual cost to the person registering the vehicle rather than

upon its sticker price. Presumably because the person registering the vehicle might have purchased it new or, instead, in a subsequent year as a used vehicle, the DMV interpreted the "first year" of the depreciation schedule to be the year the vehicle was sold to the first person to register the vehicle in California.[10/] Apparently, the DMV adopted this approach because the actual cost of a used vehicle already would reflect the depreciated value of the vehicle. The DMV's application of the depreciation schedule to vehicles purchased outside the state, however, directly conflicted with the clear command of the then-governing language of section 10753.2, subdivision (c), that the "first year" of the depreciation schedule be "the year [the vehicle was] first sold to a consumer as a new vehicle." (Stats. 1948, ch. 26, § 3, p. 130.)

In 1977, the Legislature amended section 10753.2,

[10/] For example, an automobile sold new in California two years ago and having a sticker price of $10,000 would be considered in its "third year" of the depreciation schedule and would be assigned a market value of 70 percent of $10,000, or $7,000. If instead this vehicle originally had been sold outside California and was resold two years later for $8,500 to a person who registered it in California, the DMV would consider the vehicle to be in its "first year" of the depreciation schedule and would assign it a market value of 85 percent of $8,500, or $7,225. It is apparent from the foregoing example that whether this method of applying the depreciation schedule will penalize or benefit the purchaser of an out-of-state vehicle depends upon the purchase price. In the example, lowering the purchase price of the two-year-old, out-of-state vehicle to $8,000 would produce a market value of $6,800.

subdivision (c), to provide that the depreciation schedule could be applied starting "with either the year the vehicle was first sold to a consumer as a new vehicle or the year the vehicle was first purchased or assembled by the person applying for original registration in this state." (Stats. 1977, ch. 821, § 1, p. 2491.) This amendment provided statutory authorization for the DMV's already well-established practice of treating as the "first year" of the depreciation schedule the year a vehicle was purchased outside the state by the person applying for registration.

In 1983, while the present litigation was pending, section 10753, subdivision (a), was amended to require the DMV to base the market value of all vehicles "on the basis of the cost price to the purchaser as evidenced by a certificate of cost ...." (Stats. 1983, ch. 323, § 79.1, p. 1017.) Effective June 30, 1991, the statute again was amended to require the DMV to redetermine the market value of a vehicle, based on its actual cost, upon its sale as a used vehicle. (§ 10753, subd. (a).) For vehicles first registered in 1983 or later, therefore, the market value is based upon the actual cost of the vehicle, whether or not it was purchased in California. For a vehicle first registered before 1983 and not sold as a used vehicle after June 30, 1991, however, the method used by the DMV to determine the market value of the vehicle depends upon where the vehicle originally was purchased.

The reference to the "California suggested base price" also was deleted from section 10753.2, subdivision (a), by the 1983 legislation. Because of the 1977 amendment discussed above, however, section 10753.2, subdivision (c), continued to permit the DMV to treat the "first year" of the depreciation schedule either as "the year

the vehicle was first sold to a consumer as a new vehicle or the year the vehicle was first purchased or assembled by the person applying for original registration in this state ...." (Stats. 1977, ch. 821, § 1, p. 2491.)[11/]

Use Taxes

The use tax (§ 6201 et seq.) complements the sales tax (§ 6051 et seq.). The sales tax "levies a tax upon the gross receipts of California retailers from sales of tangible personal property," while the use tax "imposes an excise on the consumer at the same rate [as the sales tax] for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government." (*Southern Pac. Co. v. Gallagher* (1939) 306 U.S. 167, 171 [83 L.Ed. 586, 590, 59 S.Ct. 389]; § 6401.) Thus, for example, the use tax is applied to goods purchased from out-of-state retailers (which are not subject to California sales tax), thereby preventing such out-of-state retailers from enjoying

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[11/] As amended in 1991, section 10753.2, subdivision (c), defines the "first year" of the depreciation schedule as "the year the vehicle was first sold to a consumer as a new vehicle, or the year the vehicle was first purchased or assembled by the person applying for original registration in this state, or the year the vehicle was sold to the current registered owner as a used vehicle ...." (§ 10753.2, subd. (c), italics added.)

an unfair advantage over local retailers.[12/] The sale of a vehicle by a private party (i.e., not a licensed dealer) is exempted from the sales tax but is subject to the use tax, unlike the occasional sale of other types of personal property by a private party which is exempt from all tax. (§§ 6282, 6367.)

The DMV collects the use tax on vehicles on behalf of the SBE. (Veh. Code, §§ 4750.5, 38211.) Payment of the use tax must accompany an application to transfer ownership of a vehicle registered in California or to register a vehicle purchased outside the state. (Veh. Code, §§ 38211, 4300.5.) The use tax, like the sales tax, is based upon a percentage of the sales price of the item (§§ 6012, 6051, 6201) but, until recently, where use tax on a vehicle is concerned, former section 6276 declared that "the sales price shall be presumed to be an amount equal to the market value of the vehicle at the time of the purchase as that value is determined to measure vehicle license fees ...." (Italics

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[12/] As we explained in *Union Oil Co. v. State Bd. of Equal.* (1963) 60 Cal.2d 441, 449: "If the California businessman, intending to buy property for use in California, could avoid the sales tax merely by purchasing the product outside the state, the local retailer would suffer a severe commercial disadvantage. Hence California imposes an excise tax upon the purchaser of tangible personal property in the event that, having paid no sales tax to California on the purchase, he proposes to and actually does store, use, or otherwise consume such property in this state."

A credit against the use tax is allowed for sales taxes paid to another state with respect to the property. (§ 6406.)

added.)[13/] This presumption did not apply, however, to vehicles "purchased outside this state from the manufacturer or from a vehicle dealer ...." (*Ibid.*) The statute further provided that this presumption "may be rebutted by evidence which establishes that the sales price was other than that amount." (Former § 6276.)

Former section 6276, therefore, established a rebuttable presumption, applicable to the purchase of vehicles from private parties, that the sales price on which the use tax was based was equivalent to the market value used to determine vehicle-license fees. The trial court found that from 1967 to November 1976, the DMV utilized this presumption in calculating the use tax due on the sale of vehicles by private parties in California. The DMV would calculate the current market value, as determined for vehicle-license-fee purposes, using the classification code assigned to the vehicle when it was new, and would base the use tax due on this depreciated market value.

As noted above, however, a vehicle originally purchased outside the state was not assigned such a classification code, because the DMV did not receive a "report of sale" from out-of-state dealers. When an out-of-state vehicle was registered in California, therefore, the market value used to determine the vehicle-license fee was based on the actual cost of the vehicle, as shown by a certificate of cost provided by the owner. In such a case, the use tax also was based on the actual cost of the vehicle

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[13/] Section 6276 was repealed effective August 1, 1991. (Stats. 1991, ch. 87, § 1.)

as shown by a certificate of cost.

Thus, during this period, vehicles purchased from dealers within and outside California were taxed equally. If a vehicle was sold by a dealer in California, a sales tax was assessed based on the sales price. If a vehicle was sold by a dealer outside the state, a use tax based on the sales price was assessed when the owner registered the vehicle in California.

The amount of the use tax imposed on vehicles purchased from private parties, however, depended upon where they were purchased. If a vehicle originally sold in California was purchased as a used vehicle from a private party in California, the DMV used the former section 6276 presumption and would base the use tax on the market value as determined for vehicle-license-fee purposes. If a vehicle originally sold outside the state was purchased as a used vehicle from a private party in another state, however, the DMV would base the use tax on the actual cost of the vehicle to the person registering the vehicle in California.

Accordingly, the DMV's practice during this period of determining the market value of a vehicle originally sold in California based upon its sticker price but determining the market value of a vehicle originally sold elsewhere based upon its actual cost, resulted not only in higher license fees for out-of-state vehicles, but also in higher use taxes for vehicles purchased in other states from private parties.

In November 1976, after Woosley had purchased and attempted to register his vehicle, the DMV and the SBE concluded lengthy discussions and, relying upon an opinion

of the Attorney General (59 Ops.Cal.Atty.Gen. 47 (1976)), agreed that the DMV would begin calculating the use tax on all vehicles purchased from private parties on the basis of their actual cost, as shown by a certificate of cost provided by the owner, rather than the depreciated sticker price, as reflected in the classification code assigned to vehicles first sold in California. This change brought to an end the discrepancy which existed in the calculation of the use tax between vehicles purchased from private parties in California and vehicles purchased outside the state, but raised the issue whether this change in practice constituted a regulation, requiring the DMV to comply with the provisions of the Administrative Procedure Act pertaining to the enactment of regulations. (Gov. Code, § 11340 et seq.)

Lower-court Rulings

The trial court found that the DMV's employment of a method to compute the vehicle-license fees and use taxes due on vehicles originally purchased outside California which differed from the method used for vehicles originally purchased within the state, resulted in the imposition of "significantly higher" fees and taxes on vehicles purchased outside the state. The court held that this practice violated "applicable state statutes and regulations," as well as the commerce clause of the federal Constitution and the equal protection clauses of the state and federal Constitutions. With regard to vehicle-license fees, this practice began in 1967 and continues to the present time as to vehicles first registered before 1983 although, as described above, recent legislation has eliminated the different treatment for vehicles sold after June 30, 1991, as used. With regard to use taxes, however, the different treatment ended in November

1976, when the DMV adopted its new policy of basing the use tax as to all vehicles on their actual cost.

The trial court further held that the November 1976 agreement between the SBE and the DMV to begin basing the use tax for all vehicles on their actual cost was invalid, because the agreement was not adopted as a formal regulation in compliance with the requirements of the Administrative Procedure Act. (Gov. Code, § 11340 et seq.)

Subsequently, the trial court resolved the previously bifurcated class-certification issues by certifying two classes. One of these classes consists of "[a]ll persons in the State of California who from within three years prior to October 20, 1977 [when Woosley mailed his initial claim for refund][14] to the date of the refund, were charged and paid more vehicle-license fees or use taxes for registration of vehicles previously registered or titled outside of the State of California because those fees or taxes were based on the actual cost of those vehicles rather than on the statutorily presumed price ...."[15] The trial court found that

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[14] Sections 6902 and 10901 and Vehicle Code sections 42231 and 42232 provide that claims for refunds of vehicle-license fees and use taxes must be filed within three years after the date of the payment.

[15] This class also should include persons who paid higher fees and taxes because the DMV applied the section 10753.2 depreciation schedule to vehicles originally purchased outside California in a manner different from that applied to vehicles originally purchased within the state. It appears the trial court's

approximately 2.8 million persons are included within this class. The other class consists of all persons who, since November 1976, have paid higher use taxes on vehicles because of the DMV's decision to begin basing the calculation of such taxes for all vehicles on the actual cost of the vehicle. The trial court found that approximately 14 million persons are included within this class.

The court awarded $13.7 million to counsel for the class as attorney fees, and $ 1 million in fees to Woosley, who is an attorney, "for services rendered as class representative," directing that both sums be paid from the common fund recovered. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 35.)

The state appealed. Woosley in his individual capacity also appealed, contending the trial court erroneously denied him attorney fees for the legal assistance he rendered to the class and compensated him solely "as class representative." The Court of Appeal consolidated the two appeals, affirmed the judgment on the principal appeal, and vacated the award of fees to Woosley, remanding the matter for a hearing as to whether Woosley is entitled to an award of fees for his legal services.

We granted the state's petition for review, specifying that "[t]he issues to be argued before this court shall be limited to those addressed in the published portion of the Court of Appeal opinion." We thereby excluded from

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failure to include such persons in its description of the class was inadvertent.

consideration by this court the question whether Woosley had exhausted his administrative remedies, as well as a number of other peripheral issues. By subsequent order, we granted Woosley's request to expand the scope of our review to include the issue whether the practices followed by the state violated the equal-protection clauses of the federal and state Constitutions.

DISCUSSION

Statutory Interpretation

The state contends it was authorized by statute to employ methods of computing vehicle-license fees and use taxes for vehicles originally purchased outside California which differed from the methods applied to vehicles originally purchased within the state. The state notes that from 1967 to 1983, section 10753 directed that for purposes of calculating vehicle-license fees and use taxes, the market value of vehicles "shall be determined ... upon the basis of the California suggested base price as herein defined" but further provided that, "[i]n the event the [DMV was] unable to ascertain the California suggested base price ..., the [DMV] shall determine the market value upon the basis of the cost price to the purchaser ...." (Stats. 1967, ch. 435, § 1, pp. 1647-1648.) The state argues that vehicles originally purchased outside California had no "California suggested base price" and, therefore, the statute commanded that the market value of those vehicles be based on their actual cost.

"We begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In

determining such intent '[t]he court turns first to the words themselves for the answer.' [Citation.] We are required to give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' [Citations.] 'If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.' [Citation.] '[A] construction making some words surplusage is to be avoided.' [Citation.]" (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 .)

The words used by the Legislature suggest that only vehicles originally sold in California had a "California suggested base price"; otherwise the word "California" would be mere surplusage.

Plaintiff points out that the pre-1967 version of section 10753 used the word "California" in a similar fashion in the phrase "California delivered price," but the DMV had treated all vehicles alike regardless of where they originally were purchased. This circumstance is significant but not dispositive. The exact meaning of the phrase "California delivered price," as used in the former version of section 10753, is unclear, because the Legislature had provided that this term would be "defined ... by the manufacturers." The 1967 amendment, however, expressly defined the new term "California suggested base price" to include the cost of "emission control devices as are required by Section 24390 [now 39129] of the Health and Safety Code, ..." (Stats. 1967, ch. 435, § 1, p. 1648.) The cost of such emission-control devices would appear only on the stickers of vehicles sold new in California.

In addition, the administrative construction of section

10753 adopted by the DMV immediately after the 1967 amendment of the statute, while "not necessarily controlling, ... 'is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.' [Citations.]" (*Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 647.)

Finally, in 1977, the Legislature endorsed this administrative construction by amending section 10753.2 to authorize the DMV to apply the depreciation schedule beginning with the year the vehicle was purchased by the person seeking to register the vehicle. Despite the prior lack of statutory authorization, the DMV, since the 1967 amendments to sections 10753 and 10753.2, had been applying the depreciation schedule in this fashion to vehicles originally purchased outside the state. As explained above, the DMV adopted this approach as a direct consequence of its conclusion that only California vehicles had a "California suggested base price," and its resulting practice of basing the market value of vehicles purchased in other states upon their actual cost. By amending section 10753.2 to authorize the DMV's application of the depreciation schedule, the Legislature endorsed the DMV's administrative construction of section 10753, from which the DMV's application of the depreciation schedule had resulted.

Accordingly, we conclude that the DMV's practice of imposing vehicle-license fees and use taxes on vehicles originally purchased in California, different from the fees and taxes imposed upon similar vehicles originally purchased outside the state, was statutorily authorized. Thus, we proceed to consider whether this practice placed a disproportionate burden on interstate commerce in

violation of the commerce clause of the federal Constitution.

Commerce Clause

"Article I, § 8, cl. 3 of the [United States] Constitution expressly authorizes Congress to 'regulate Commerce with foreign Nations, and among the several States.' It says nothing about the protection of interstate commerce in the absence of any action by Congress. Nevertheless, ... the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The clause ... 'by its own force' prohibits certain state actions that interfere with interstate commerce. [Citation.]" (*Quill Corp. v. North Dakota* (1992) ____U.S. ____, ____ [119 L.Ed.2d 91, 104, 112 S.Ct. 1904].) The high court has held that a state tax that affects interstate commerce does not violate this "negative" or "dormant" commerce clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *(Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279 [51 L.Ed.2d 326, 331, 97 S.Ct. 1076] [hereafter *Complete Auto Transit*]; accord, *Goldberg v. Sweet* (1989) 488 U.S. 252, 259-260 [102 L.Ed.2d 607, 615-616, 109 S.Ct. 582].)

The issue here relates to the third element of the *Complete Auto Transit* test--whether the tax discriminates against interstate commerce. Such discrimination may arise in several guises, and "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." (*Amerada Hess Corp. v. N. J. Taxation Div.*

(1989) 490 U.S. 66, 75 [104 L.Ed.2d 58, 68, 109 S.Ct. 1617].)

As numerous cases have established, a tax which is imposed at a uniform rate on interstate and intrastate commerce still may be facially discriminatory if state law defines the tax base differently for interstate transactions, with the result that they incur a higher tax than that imposed on intrastate transactions. For example, in *Halliburton Oil Well Co. v. Reily* (1963) 373 U.S. 64 [10 L.Ed.2d 202, 83 S.Ct. 1201], Louisiana imposed sales and use taxes at a uniform rate upon property purchased within and without the state, respectively. Nevertheless, the use tax was held unconstitutional as applied to trucks the taxpayer had assembled outside the state and brought into Louisiana, because the state had included in the trucks' taxable value the cost of labor and shop overhead attributable to assembling the units, costs which would not have been included had the trucks been assembled within the state.

In *Tyler Pipe Industries v. Dept. of Revenue* (1987) 483 U.S. 232, 248 [97 L.Ed.2d 199, 214, 107 S.Ct. 2810], the court invalidated a Washington tax on manufacturing because the law favored local manufacturers who sold their products within the state, by granting them a partial exemption from the manufacturing tax unavailable to local manufacturers who sold their products outside the state and unavailable to out-of-state manufacturers who sold their products in Washington.

In *New Energy Co. of Indiana v. Limbach* (1988) 486 U.S. 269 [100 L.Ed.2d 302, 108 S.Ct. 1803], the court invalidated a provision of the Ohio motor-vehicle tax which awarded a tax credit for sales of ethanol produced in Ohio

or in a state that grants similar tax advantages to ethanol produced in Ohio, but not for sales of ethanol produced in other states.

And in *Matthews v. State, Dept. of Revenue* (1977) 193 Colo. 44 [562 P.2d 415], the Colorado Supreme Court invalidated a tax system which authorized a trade-in allowance when computing the sales tax due on a vehicle purchased in Colorado, but allowed no such deduction when computing the use tax due on a vehicle purchased outside the state. In each of these cases, taxes were imposed at a uniform rate, but the state discriminated against interstate transactions in defining the base upon which such taxes were levied.

In the present case, the DMV employed two different methods of defining market value for purposes of computing both vehicle-license fees and use taxes: if the vehicle originally was purchased in California, the market value was the depreciated sticker price, excluding the cost of optional equipment; if originally purchased elsewhere, it was the actual purchase price. The discrimination between interstate and local commerce is plain. In cases, such as Woosley's, in which this discrimination resulted in the imposition of higher fees and taxes on vehicles purchased outside the state (a situation which the trial court generally found to be the case), the violation of the commerce clause is patent.

The state, contending the foregoing authority is not controlling, instead argues that language in the decision in *Goldberg v. Sweet, supra*, 488 U.S. 252, mandates the conclusion that the DMV's methods of collecting vehicle-license fees and use taxes did not offend the

commerce clause. In Goldberg, Illinois had imposed a 5 percent tax on all interstate telecommunications which originated or terminated in the state and which were charged to an Illinois service address. An identical 5 percent tax was imposed on intrastate telecommunications. In a class action, Illinois residents claimed the tax on interstate telecommunications violated the commerce clause.

The court in *Goldberg v. Sweet, supra,* 488 U.S. 252, applying the four-part *Complete Auto Transit* test, upheld the tax. In holding, under the third prong of that test, that the taxes did not discriminate against interstate commerce "by allocating a larger share of the tax burden to interstate telephone calls," the court distinguished *American Trucking Assns., Inc. v. Scheiner* (1987) 483 U.S. 266 [97 L.Ed.2d 226, 107 S.Ct. 2829]. "In *Scheiner*," it said, "we held that Pennsylvania's flat taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways. [Citation.] The Illinois tax differs from the flat taxes found discriminatory in *Scheiner* .... [W]hereas Pennsylvania's flat taxes burdened out-of-state truckers who would have difficulty effecting legislative change, the economic burden of the Illinois telecommunications tax falls on the Illinois telecommunications consumer, the insider who presumably is able to complain about and change the tax through the Illinois political process. It is not a purpose of the Commerce Clause to protect state residents from their own state taxes." (*Goldberg v. Sweet, supra,* 488 U.S. at p. 266, italics added.)

The state contends the emphasized language in the quoted passage is conclusive. It reads that language as holding unequivocally that so long as a state imposes a tax only on its residents, the commerce clause permits it to discriminate against those residents who engage in interstate transactions. Although the taxes at issue in *Goldberg* were imposed only on residents of the taxing state, this circumstance was not regarded by the high court as conclusive. Rather, it treated this as one factor to be considered in deciding whether the taxes offended the commerce clause. The court went on to discuss another factor before concluding that the taxes did not discriminate in favor of intrastate commerce, and discussed the three remaining prongs of the test set forth in *Complete Auto Transit* before holding that the taxes did not violate the commerce clause.

Nowhere in the decision in *Goldberg v. Sweet, supra*, 488 U.S. 252, does the court declare that taxes imposed on residents of the taxing state never can offend the commerce clause. What the high court does say is that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." (*Id.* at p. 266.) This is hardly a remarkable proposition. The purpose of the commerce clause is to protect interstate commerce by " 'creat[ing] an area of trade free from interference by the States.' [Citations.]" (*American Trucking Assns., Inc. v. Scheiner, supra*, 483 U.S. 266, 280.) The commerce clause is not designed to protect taxpayers of the taxing state, but to protect interstate commerce.

We must determine whether, by stating this obvious proposition, the high court meant to suggest that a tax never can offend the commerce clause so long as it is levied on

residents of the taxing state. Such a ruling would be inconsistent with a long line of prior decisions rendered by the United States Supreme Court.

That court has, on numerous occasions, invalidated taxes imposed by states upon their own residents where those taxes placed an undue burden on interstate commerce. Such decisions include, for example, *Tyler Pipe Industries v. Dept. of Revenue, supra,* 483 U.S. 232, discussed above; *Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. 263 [82 L.Ed.2d 200, 104 S.Ct. 3049], which invalidated a liquor tax imposed on local wholesalers, because it exempted locally produced beverages; *Evco v. Jones* (1972) 409 U.S. 91, 93 [34 L.Ed.2d 325, 328- 329, 93 S.Ct. 349], which invalidated an unapportioned tax on the gross receipts from sales of personal property by local companies to out-of-state customers; and *Greyhound Lines v. Mealey* (1948) 334 U.S. 653, 662- 663 [92 L.Ed. 1633, 1641-1642 68 S.Ct. 1260], which invalidated an unapportioned tax on the gross receipts from interstate transportation levied on local carriers.

The interpretation of *Goldberg v. Sweet, supra,* 488 U.S. 252, urged by the state also would be inconsistent with well-established and unquestioned principles of commerce-clause jurisprudence, such as the rule that a use tax on out-of-state purchases is valid only if it imposes a burden no greater than the sales tax imposed on local purchases (*Henneford v. Silas Mason Co.* (1937) 300 U.S. 577, 584 [81 L.Ed. 814, 819-820, 57 S.Ct. 524]) and the rule that a state may not levy an income tax which taxes value earned outside its borders (*Container Corp. v. Franchise Tax Bd.* (1983) 463 U.S. 159, 164 [77 L.Ed.2d 545, 552, 103 S.Ct. 2933]).

Subsequent to the decision in *Goldberg v. Sweet, supra*, 488 U.S. 252, the high court has continued to rely upon the above cited cases in deciding related issues, with no indication that the decision in *Goldberg* has lessened the value of those cases as precedent. (See, e.g., *McKesson Corp. v. Florida Alcohol & Tobacco Div.* (1990) 496 U.S. 18, 46 [110 L.Ed.2d 17, 41-42 110 S.Ct. 2238]; *Amerada Hess Corp. v. N. J. Taxation Div., supra,* 490 U.S. at pp. 75-76.)

Although the high court has not, since its decision in *Goldberg v. Sweet*, addressed a commerce-clause challenge to a tax imposed by a state upon residents of that state, the court recently addressed an analogous issue in *Wyoming v. Oklahoma* (1992) 502 U.S. [117 L.Ed.2d 1, 112 S.Ct. 789]. In that case, the state action under review was not a tax imposed upon state residents, but a statute, directed solely at state residents, which could be enforced by criminal penalties or injunctive relief. The statute, enacted by the Oklahoma Legislature, required coal- fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal containing at least 10 percent Oklahoma-mined coal. The high court held the statute was unconstitutional under the commerce clause. No mention was made of the decision in *Goldberg v. Sweet.*

The holding in *Wyoming v. Oklahoma* is incompatible with the interpretation of the decision in *Goldberg v. Sweet* urged by the state in the appeal before us. The statute invalidated in *Wyoming v. Oklahoma* was directed solely at residents of Oklahoma. The effect of the statute, however, was to place a burden on interstate commerce. Obviously, the circumstance that Oklahoma chose to favor the purchase of locally mined coal by passing

a statute enforceable by criminal penalties and injunctive relief, rather than by imposing a tax, does not distinguish the decision in *Wyoming v. Oklahoma* from the decision in Goldberg v. Sweet. The decision in *Wyoming v. Oklahoma*, therefore, confirms that the state's interpretation of *Goldberg v. Sweet* is incorrect.

We conclude that the language in *Goldberg v. Sweet, supra,* 488 U.S. 252, relied upon by the state does not support the state's contention. The high court merely acknowledged that the circumstance that a disputed tax is levied upon residents of the taxing state, who are able to challenge the tax through political means, is one factor to be considered in determining whether the tax offends the commerce clause. This factor, however, is not dispositive. The high court did not uphold the telecommunications taxes in *Goldberg* on the sole basis that they were imposed only upon residents of the taxing state, but did so because the taxes did not place a disproportionate burden on interstate commerce. Contrary to the state's position, nothing in the decision in *Goldberg* alters the settled rule that a tax which is levied upon residents of the taxing state and imposes an undue burden on interstate commerce offends the commerce clause.

In the present case, the state discriminated against interstate commerce by imposing higher license fees on out-of-state vehicles and by imposing higher use taxes on vehicles purchased from private parties in other states. The circumstance that these fees and taxes were imposed upon residents of California is a factor to be considered, but is not sufficient, standing alone, to overcome this patent discrimination. Rather, such unequal treatment of interstate and intrastate transactions violates the commerce clause

"unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism [citation]." (*New Energy Co. of Indiana v. Limbach, supra,* 486 U.S. 269, 274.)

"[T]he standards for such justification are high." (*New Energy Co. of Indiana v. Limbach, supra,* 486 U.S. 269, 278.) For example, a state's legitimate need "to protect the health and safety of its citizens and the integrity of its natural resources" has been held, in the absence of a reasonable, nondiscriminatory alternative, to justify an obstruction to interstate commerce. (*Maine v. Taylor* (1986) 477 U.S. 131, 151 [91 L.Ed.2d 110, 129, 106 S.Ct. 2440].) The high court has noted, however, that "facial discrimination by itself may be a fatal defect" and that "[a]t a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." (*Hughes v. Oklahoma* (1979) 441 U.S. 322, 337 [60 L.Ed.2d 250, 262, 99 S.Ct. 1727].)

The only justification suggested by the state for the discrimination that exists in the present case is administrative convenience. Assuming, without deciding, that such a concern could, under some circumstances, justify an obstruction to interstate commerce, the showing made by the state in this case is insufficient to meet the high standards described in the foregoing decisions.

With respect to vehicle-license fees, the state contends it would have been difficult, if not impossible, to determine a California sticker price for vehicles originally sold in other states. Assuming this is true, a state may not adopt a method of imposing a tax that on its face applies

only to vehicles originally sold within the state, and then seek to justify the ensuing discrimination against interstate commerce on the basis of the administrative difficulties involved in applying this facially discriminatory method to vehicles first sold elsewhere. The state could have utilized a method of imposing vehicle-license fees which was applicable regardless where the vehicle first had been sold. Such a system was in fact utilized prior to the adoption of the discriminatory practice in question, although the DMV found this rate-book system unworkable. A different, but equally nondiscriminatory, procedure currently is in place. We do not suggest the state was required to use either of these systems, but their existence makes it difficult for the state, in justification of its facial discrimination against interstate transactions, to demonstrate "the absence of nondiscriminatory alternatives." (*Hughes v. Oklahoma, supra*, 441 U.S. 322, 337 [60 L.Ed 2d 250, 262].)

With respect to the use tax, we are unpersuaded by the state's assertion that it would have been administratively burdensome to base the tax for vehicles sold within California on their actual cost rather than on their presumed market value. The state long has based the tax applicable to vehicles sold outside the state on their actual cost. Any additional burden on the state, caused by also basing the use tax for vehicles purchased in California on the actual cost of the vehicle, was insufficient to deter the DMV from adopting this practice in 1976 at the urging of the SBE, and to deter the Legislature from repealing the section 6276 presumption in 1991. Therefore, the justifications asserted by the state for imposing higher vehicle-license fees and use taxes on out-of-state vehicles are inadequate to withstand the heightened scrutiny required of practices which discriminate against interstate commerce.

We conclude that the state's practice of imposing vehicle-license fees on vehicles originally purchased outside California which were generally higher than those imposed upon similar vehicles originally purchased within the state, and of imposing use taxes on vehicles purchased from private parties outside California which were generally higher than those imposed upon similar vehicles purchased from private parties within the state, violated the commerce clause of the federal Constitution.[16/] Members of the class who paid license fees on vehicles originally purchased outside California, or use taxes on vehicles purchased from private parties outside California, which were higher than the license fees or use taxes that would have been required had those vehicles originally been purchased within the state, are entitled to refunds.

Administrative Procedure Act

The trial court and the Court of Appeal held that the November 1976 agreement between the SBE and the DMV to begin collecting use taxes for all vehicles on the basis of actual cost was "procedurally defective" because it was not adopted as a formal regulation in compliance with the requirements of the Administrative Procedure Act (APA). (Gov. Code, § 11340 et seq.) Assuming, arguendo, this is true, we conclude no refund of use taxes is required, because the amount of the use taxes collected was due the

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[16/] In light of our holding, we need not and do not reach the issue whether the state's practices violate the equal-protection clauses of the federal and state Constitutions.

state under applicable tax statutes.

As explained previously, former section 6276 provided that, in calculating the use tax applicable to a vehicle, its sales price was presumed equal to the market value as determined in calculating the vehicle-license fee. That statute further provided that the foregoing presumption could "be rebutted by evidence which establishes that the sales price was other than [that] amount." (Former § 6276, repealed by Stats. 1991, ch 87, § 1.) Prior to November 1976, the DMV relied upon this presumption in collecting use taxes on vehicles purchased from private parties within California but, for vehicles purchased outside the state, based its calculation on the actual cost of the vehicle.[17/]

In 1976, the DMV entered into an interagency agreement with the SBE, effective November 15, 1976, which provided that in all private- party transactions, both in-state and out-of-state, the DMV would require a certificate of cost to establish the actual sales price of the

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[17/] As noted previously, vehicles purchased from licensed dealers in California were subject to sales tax based upon the actual cost of the vehicle. As also noted above, the presumption set forth in former section 6276 did not apply to vehicles purchased outside the state from licensed dealers. When such a vehicle was registered in California, a use tax was imposed based on the actual cost of the vehicle to the person seeking registration. Thus, vehicles purchased from dealers were taxed equally regardless where they were purchased.

vehicle.[18]

The courts below held that this agreement constituted a regulation as defined in the APA.[19] The APA provides that the adoption, amendment, or repeal of any administrative regulation must comply with certain basic, minimum procedural guidelines. (Gov. Code, § 11346.) Among other things, the APA provides for adequate notice to interested persons of the proposed action. (Gov. Code, § 11346.4.) It also provides for a public hearing or an opportunity for interested persons to present contentions in

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[18] The agreement states: "The Department shall compute the use tax on a vehicle required to be registered ... measured by the sales price of the vehicle. In the absence of a bill of sale or other documented evidence of the sales price, the sales price of a vehicle required to be registered shall be determined from a Certificate of Cost signed by the purchaser of the vehicle." The DMV issued a memorandum informing all field-office managers of the inter-agency agreement, and directing that "[w]hen a motorist has purchased a vehicle from a private party and applies for a transfer of ownership, he will be required to complete a Certification of Purchase Price or present an acceptable bill of sale."

[19] Government Code section 11342, subdivision (b), states in pertinent part: " 'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency."

writing, before any state agency may adopt, amend, or repeal any regulation. (Gov. Code, § 11346.8.) In the present case, the state admits that the DMV and the SBE entered into and implemented the agreement without complying with the notice and hearing requirements of that act.

Relying upon the decision in *Market St. Ry. Co. v. Cal. St. Bd. Equal.* (1955) 137 Cal.App.2d 87 [hereafter, *Market St.*], however, the state contends that even if the DMV and the SBE erroneously failed to comply with the APA, use taxes collected pursuant to the invalid agreement need not be refunded because such taxes properly were due under state law. We agree.

In *Market St.*, the City of San Francisco purchased the Market Street Railway Company. At the time of the sale, an interpretative ruling of the SBE provided that no sales tax was due in connection with the sale of an entire business. Market Street Railway Company was aware of this regulation and relied upon it in concluding it owed no sales tax as a result of the sale of its business to the city. Two days after the sale was completed, the SBE revised its regulation to state that sales tax was due on that portion of the proceeds of the sale of a business that represents the fair retail value of the tangible personal property acquired for use rather than resale.

The Court of Appeal held that the state was not estopped from collecting sales taxes on the sale of the business which properly were due under state law. Noting it was obvious that "a tax administrator should not be permitted by an erroneous ruling to exempt a taxpayer from the obligation to pay taxes" (*Market St., supra*, 137

Cal.App.2d at pp. 100-101), the court relied on " 'the general rule that the government does not lose its revenues because of an erroneous ruling of an administrative official as to the meaning of a tax law.' " (*Id.* at pp. 101-102.)

A similar principle applies here. " 'The duty of the tax officials is to collect tax imposed by law ....' " (*Market St., supra,* 137 Cal.App.2d at p. 102.) The failure of the SBE and the DMV to comply with the requirement of the APA in adopting their agreement regarding collection of use taxes does not exempt taxpayers from the obligation to pay such taxes as are required by state law, and cannot deprive the state of the tax revenues to which it is entitled.[20/]

Plaintiff makes no attempt to distinguish the decision in *Market St.* In fact, plaintiff does not contend that the invalidity of the regulation requires the state to refund use taxes collected pursuant to that regulation, but relies instead on the argument that the applicable statutes did not authorize the state to require a certificate of cost in collecting those taxes. Based on an examination of the statutes, we conclude otherwise.

With respect to the determination of the use tax,

[20/] In reaching a contrary result, the Court of Appeal relied upon Government Code section 11350, which authorizes an action for declaratory relief to determine the validity of a regulation. This statute, however, is strictly construed in tax cases and may not be used to prevent the state from collecting taxes or, by parity of reasoning, to compel the state to refund taxes. (*Pacific Motor Transport Co. v. State Bd. of Equalization* (1972) 28 Cal.App.3d 230, 236.)

former section 6276 stated that the presumption that the sales price of a vehicle equalled the market value, as determined in calculating the vehicle-license fee, could be rebutted "by evidence which establishe[d] that the sales price was other than such amount." The section did not specify which party could rebut the presumption, nor did it suggest that the purchaser should be excused from the obligation to pay the use tax based on the actual sales price, when that figure was available. (§ 6201 and 6011.) If the Legislature intended something so unusual as a presumption rebuttable by one party and not the other, we believe it would have said so. The conclusion appears clear, therefore, that both the state and the taxpayer were free to rebut the presumption by appropriate contrary evidence.

Plaintiff, however, contends--and the Court of Appeal agreed--that the foregoing interpretation is contrary to the Legislature's intent. Plaintiff points out that in 1971, the Legislature considered and rejected a bill which would have rewritten former section 6276 to require vehicle owners to report the sales price of their vehicle. The use tax would have been based on this reported sales price if it was greater than the market value of the vehicle, as determined in calculating the vehicle-license fees. If the reported sales price was less than the market value used to determine license fees, the former rebuttable presumption would have applied unless the owner presented a bill of sale.[21/] The Legislature, cognizant of the fact that the

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[21/] As amended June 4, 1971, Assembly Bill No. 1338 read: "SECTION 1. Section 6276 of the Revenue and Taxation Code is repealed. [¶] Sec. 2. Section 6276 is added to the Revenue and Taxation Code, to read: [¶] 6276. Except when a vehicle is

statutory presumption was yielding less revenue than would a tax based on actual cost, declined to adopt the above described procedure. Instead, the Legislature amended former section 6276, retaining the rebuttable presumption but providing that if the presumption was utilized, the market value as determined for vehicle-license-fee purposes

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purchased outside this state from the manufacturer or from a vehicle dealer, the Department of Motor Vehicles shall collect the use tax in accordance with this section whenever the purchaser of a vehicle is required to pay the use tax. [¶] (a) The purchaser shall be required to report to the department the sales price of the vehicle to the purchaser, including cash, liability assumed and value of any property traded. If this sales price is greater than the value determined to measure vehicle license fees imposed under Part 5 (commencing with Section 10701) of this division, the sales price reported by the purchaser shall be used as the measure of the use tax. [¶] (b) If the total sales price reported by the purchaser is less than the value determined to measure vehicle license fees and the purchaser presents a bill of sale from the seller evidencing the total sales price, the sales price reported by the purchaser shall be used as the measure of the use tax. [¶] (c) If the total sales price reported by the purchaser is less than the value determined to measure vehicle license fees and the purchaser does not present a bill of sale from the seller evidencing the total sales price, the sales price of the vehicle shall be presumed to be its market value at the time of purchase as that value is determined to measure vehicle license fees imposed under Part 5 (commencing with Section 10701) of this division. The presumption may be rebutted by evidence which establishes that the sales price was other than such market value." (3 Assem. J. (1971) Reg. Sess.) p. 4526.)

would be increased by 20 percent.[22/] From these circumstances, plaintiff would infer that the Legislature intended the presumption to govern in a significant number of cases, and was opposed to basing the tax in all cases on actual cost. We disagree.

The Legislature retained not only the presumption equating sales price with the market value used to compute the vehicle-license fee, but also the provision that this presumption could be rebutted by evidence establishing that the sales price was other than such amount. The Legislature, thus, left the law unchanged in this regard; sales price was presumed to equal the market value used to determine vehicle-license fees, but this presumption could be rebutted either by the vehicle owner or the DMV.

The Legislature's unwillingness to rewrite former section 6276 to require the DMV to base use taxes on the actual cost of the vehicle does not necessarily evidence a

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[22/] As amended in 1971, former section 6276 read, in pertinent part: "Except when a vehicle is purchased outside this state from the manufacturer or from a vehicle dealer, whenever the purchaser of a vehicle is required to pay the use tax to the Department of Motor Vehicles, the sales price shall be presumed to be an amount equal to the market value of the vehicle at the time of the purchase as that value is determined to measure vehicle license fees ..., multiplied by a factor of 1.2 for a noncommercial vehicle, including a passenger vehicle ... or by a factor of 1.8 for a commercial vehicle .... The presumption may be rebutted by evidence which establishes that the sales price was other than such amount." (Stats. 1971, ch. 1741, § 1, pp. 3710-3711.)

legislative judgment that the DMV should be prevented from doing so if the DMV chose to rebut the presumption contained in former section 6276 with evidence of the actual cost of the vehicle. The Legislature's actions are consistent with an intent to leave the matter within the discretion possessed by the DMV.

Perhaps the Legislature anticipated that the presumption would govern in a significant number of cases, even though subject to rebuttal by either the state or the taxpayer. But if the presumption served only the goal of administrative convenience--and plaintiff suggests no plausible alternative purpose--then the Legislature may well have intended that the DMV have discretion to decide that the most convenient practice was one which required the registrant to present a certificate of cost. The circumstances that this practice would yield the greatest revenue, that it would avoid potentially unconstitutional discrimination between in-state and out-of-state purchases, that it would equalize the tax base for use tax and sales tax,[23/] and that the Legislature subsequently repealed the presumption, further support the conclusion that the Legislature did not intend to bar the action taken by the DMV.

Validity of the Class Claim

The state contends this suit improperly was certified

[23/] As noted above, the sales tax and the use tax are complementary, and generally designed so that a transaction yields the same revenue under each tax. (See *Union Oil Co. v. State Bd. of Equalization, supra*, 60 Cal.2d 441, 447.)

as a class action. As explained below, we do not reach this issue because we conclude that the class claim filed by Woosley was not authorized by statute.

This court has held that a class action may be employed to seek refunds of sales and use taxes (*Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 797, and has approved the use of class claims seeking damages from governmental entities for injuries caused by an act or omission of a public entity or its employee (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447]). Several decisions of the Court of Appeal have extended the holding in *City of San Jose* to permit the filing of class claims seeking tax refunds, reasoning by analogy to the claims statute construed in *City of San Jose* that the existing tax-refund statutes could and should be interpreted to authorize the filing of class claims. (*Schoderbek v. Carlson* (1980) 113 Cal.App.3d 1029, 1033; *Lattin v. Franchise Tax Board* (1977) 75 Cal.App.3d 377, 381; *Santa Barbara Optical Co. v. State Bd. of Equalization* (1975) 47 Cal.App.3d 244, 249; see also *Javor v. State Bd. of Equalization* (1977) 73 Cal.App.3d 939, 948.)

Apparently considering the question to be settled, the state has not raised the issue whether a class claim may be filed seeking refunds of vehicle-license fees and use taxes. This court, however, never has considered that issue. Because of the general public importance of the issue, and because we had serious questions concerning the resolution of the matter, we requested supplemental briefing on this issue following oral argument.

For the reasons that follow, we hold that the class claim filed in the present case was not authorized by the

statutes governing claims for refunds of vehicle-license fees and use taxes. Accordingly, that claim is valid only as to Woosley in his individual capacity, and the class in the present class action properly may include only persons who timely filed valid claims for refunds.

Plaintiff contends that this court's decision in *City of San Jose v. Superior Court, supra,* 12 Cal.3d 447 compels the conclusion that class claims may be employed to seek tax refunds. We disagree. *City of San Jose* held that a class claim could be filed pursuant to Government Code section 910, which governs claims seeking damages from governmental entities for injuries caused by an act or omission of the public entity or its employee. Government Code section 910 provides in part: "A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following: [¶] (a) The name and post office address of the claimant ...." (Italics added.) In *City of San Jose* this court stated: "We conclude 'claimant,' as used in [Government Code] section 910, must be equated with the class itself and therefore reject the suggested necessity for filing an individual claim for each member of the purported class. To require such detailed information in advance of the complaint would severely restrict the maintenance of appropriate class actions--contrary to recognized policy favoring them. [Citations.] We do not believe the claims statutes were intended to thwart class relief. [Fn.]" (*City of San Jose v. Superior Court, supra,* 12 Cal.3d 447, 457.)

Contrary to the line of Court of Appeal decisions cited above, we conclude, for the reasons that follow, that the holding in *City of San Jose v. Superior Court, supra,* 12 Cal.3d 447, should not be extended to include claims for

tax refunds.

The California Constitution expressly provides that actions for tax refunds must be brought in the manner prescribed by the Legislature. Article XIII, section 32, of the California Constitution provides in this regard: "After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature." (Italics added.) This constitutional limitation rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues. (See *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638.)

Vehicle-license fees and use taxes are excise taxes (*Piazza Properties, Ltd. v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 622, 628), refunds of which fall within the ambit of article XIII, section 32 of the state Constitution. The Legislature has provided different methods for seeking refunds of vehicle-license fees and use taxes. We turn first to the procedure which the Legislature has provided for seeking a refund of vehicle-license fees.

Section 10901 states: "Whenever the department [of motor vehicles] erroneously collects any license fee not required to be paid under this part, the amount shall be refunded to the person paying it upon application therefor made within three years after the date of the payment." (See also Veh. Code, § 42232.) Vehicle Code section 42231 provides: "[T]he person who has paid the erroneous or excessive fee or penalty, or his agent on his behalf, may apply for and receive a refund of the amount thereof as

provided in this article ...." (Italics added.) "The legislative plan requires the filing of an application for refund as a condition precedent to the existence of liability upon which, after administrative remedies are exhausted, an action may be brought." (*Piazza Properties, Ltd. v. Department of Motor Vehicles, supra*, 71 Cal.App.3d 622, 628, *State Bd. of Equalization v. Superior Court, supra*, 39 Cal.3d 633, 638.)

The Legislature, therefore, has required that a claim for a refund of vehicle-license fees must be filed by "the person who has paid the erroneous or excessive fee or penalty, or his agent on his behalf." (Veh. Code § 42231, italics added.) Within the context of this statute, the term "person" does not include a class, and a class representative who files a claim on behalf of all others similarly situated, without the knowledge or consent of such other persons, is not the agent of the members of the class. (Civ. Code, §§ 2299, 2300; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency & Employment, §§ 36-40, pp. 49-52.) Accordingly, a class claim for refunds of vehicle- license fees, such as the one here at issue, is not authorized by statute.[24/]

[24/] A substantial number of other states, with similarly worded tax- refund statutes, have concluded that class-refund claims are not permitted under their statutory schemes. (See, e.g., *Henderson v. Carter* (1972) 229 Ga. 876 [195 S.E.2d 4, 6]; *Hooks v. Comptroller of Treasury* (1972) 265 Md. 380 [289 A.2d 332, 333-334]; *Charles v. Spradling* (Mo. 1975) 524 S.W.2d 820, 823-824; *State ex rel. Sampson v. Kenny* (1970) 185 Neb. 230 [175 N.W.2d 5, 6-7]; *Bailey v. State* (N.C. 1991) 412 S.E.2d 295, 300-303 *Lick v. Dahl* (S.D. 1979) 285 N.W.2d 594, 599-600.)

We now examine the method which the Legislature has provided for seeking a refund of use taxes. Section 6901 et seq. governs claims for refunds of sales and use taxes. Sections 6902, subdivision (a), 6905, and 6932 provide that unless a claim for refund is filed within three years of the overpayment, no suit may be brought. (*Philips & Ober Electric Co. v. State Bd. of Equalization* (1991) 231 Cal.App.3d 723, 728 [282 Cal.Rptr. 338].) These statutes do not, however, address who may file such a claim or whether a class claim may be filed.

An examination of the entire statutory scheme that governed requests for refunds of sales and use taxes when Woosley's claim was filed in 1977 reveals, however, that class claims were not contemplated. If the SBE denied a claim, that entity was required, within 30 days, to "serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination." (§ 6906.) Section 6486, in turn, provided in 1977 that the SBE shall give written notice of a deficiency determination "to the retailer or person storing, using, or consuming tangible personal property,"either by mail or by "delivering it to the person to be served." The language of section 6486 suggests that notice must be given to each individual taxpayer. No mention is made of notice to a class representative. The requirement that notice of the denial of a claim must be given to each individual taxpayer thus is inconsistent with the use of a class claim.

When Woosley filed his claim in 1977, section 6904 read: "Every claim shall be in writing and shall state the

specific grounds upon which the claim is founded." In 1987, approximately 10 years after Woosley filed his claim, the Legislature amended section 6904 to add the following language as subdivision (b): "A claim filed for or on behalf of a class of taxpayers shall do all of the following: [¶] (1) Be accompanied by written authorization from each taxpayer sought to be included in the class. [¶] (2) Be signed by each taxpayer or taxpayer's authorized representative. [¶] (3) State the specific grounds on which the claim is founded." (Stats. 1987, ch. 38, § 5, p. 101.)

The statute as amended in 1987 expressly permits, for the first time, the filing of a class claim, but requires that each member of the class authorize his or her inclusion in the class and that each member of the class, or the class member's authorized representative, sign the claim. A class claim for refund of sales and use taxes may not be submitted, as it was in the present case, without the knowledge and express consent of each member of the class.

The purpose of this amendment to section 6904, governing claims for refunds of sales and use taxes, was to extend to class claims against the SBE the "written authorization requirements" imposed the year before on class claims for refunds filed with the Franchise Tax Board. (Sen. Com. on Rev. and Tax., Analyses of Measures Heard (1987-1988 Sess.) p. 417.) In 1986, the Legislature had amended section 19055, governing claims for refunds of personal income taxes, and section 26074, governing claims for refunds of bank and corporate taxes, to add language nearly identical to that later added to section 6904. Both the 1987 amendment to section 6904 and the 1986 amendments to sections 19055 and 26074 were intended to

spare the state the substantial administrative costs associated with identifying and notifying class members once a case had been certified as a class action. (Sen. Com. on Rev. and Tax., Analyses of Measures Heard, *supra*, p. 417.)

Counsel for the class asserts in its brief that the amendments to sections 6904, 19055, and 26074 demonstrate "that class claims ... were proper prior to the enactment of the amendments." (Emphasis in original.) We disagree. The circumstance that, in amending sections 6904, 19055, and 26074, the Legislature chose to allow a narrowly circumscribed form of class claims, does not demonstrate that it previously had authorized a more expansive type of class claim.

As explained above, we conclude that prior to the 1986 and 1987 amendments, class claims seeking tax refunds were not statutorily authorized. The Court of Appeal, however, had upheld the filing of such class claims. (*Schoderbek v. Carlson, supra,* 113 Cal.App.3d 1029, 1033; *Lattin v. Franchise Tax Board, supra,* 75 Cal.App.3d 377, 381; *Santa Barbara Optical Co. v. State Bd. of Equalization, supra*, 47 Cal.App.3d 244, 249; see also *Javor v. State Bd. of Equalization, supra,* 73 Cal.App.3d 939, 948.) The Legislature's response to these judicial decisions reveals no more than a desire to avoid the adverse consequences of the filing of class claims for tax refunds, and does not demonstrate that the Legislature previously had intended to authorize the filing of such class claims.

Nothing in the 1987 amendment to section 6904 indicates an intent to permit the filing of a class claim of the type here at issue, nor an acknowledgement by the

Legislature that such claims previously had been permitted. Had the Legislature amended section 6904 by explicitly prohibiting the filing of all class claims, we would not infer that the Legislature intended to suggest that previously such claims had been permitted. Here, the Legislature prohibited the type of class claim filed by Woosley. The Legislature permitted only those class claims where each member of the class expressly authorizes and signs the claim. Prior to the 1986 and 1987 amendments, the Legislature had been silent on the subject of class claims seeking refunds of use taxes. This silence did not constitute legislative authorization of such class claims.

In sum, article XIII, section 32, of the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature. Prior to the 1987 amendment to section 6904, the Legislature had not authorized class claims for refunds of use (and sales) taxes. Accordingly, class claims seeking such refunds were not permitted prior to the effective date of the 1987 amendment. We disapprove the decisions in *Schoderbek v. Carlson, supra*, 113 Cal.App.3d 1029; *Lattin v. Franchise Tax Board, supra*, 75 Cal.App.3d 377; *Javor v. State Bd. of Equalization, supra*, 73 Cal.App.3d 939, and *Santa Barbara Optical Co. v. State Bd. of Equalization, supra*, 47 Cal.App.3d 244, to the extent they express views to the contrary.

Citing the decision in *American Pipe & Construction Co. v. Utah* (1974) 414 U.S. 538 [38 L.Ed.2d 713, 94 S.Ct. 756] (hereafter, *American Pipe*), plaintiff contends that "the claims of all of the class members have been tolled during the pendency of the instant action," and that if we disallow Woosley's class claim, "notice would have to be

given to each putative class member that (1) they were entitled to a refund of use taxes and license fees, and (2) the time to file a claim for refund was running from the date of notice."

We need not, and do not, decide plaintiff's first contention that "the claims of all of the class members have been tolled during the pendency of the instant action" because that issue affects only those persons who did not file valid claims and who, therefore, are not included in the present class. "The well-established rule is that we should avoid advisory opinions. [Citation.]" (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 284; *State v. State Tax Com'n of Missouri* (Mo. 1983) 651 S.W.2d 130, 133.)

We do reach plaintiff's second contention, that if we disallow Woosley's class claim, "notice would have to be given to each putative class member that (1) they were entitled to a refund of use taxes and license fees, and (2) the time to file a claim for refund was running from the date of notice," because this issue affects the parties before the court in that the burden of providing notice would be borne by the parties. We disagree, however, with plaintiff's contention that such notice is required.

Whatever merit there may be in plaintiff's argument that the time for putative class members to file claims has been tolled, we are unaware of any requirement that notice be given to persons affected by such tolling of the period in which to file a claim. The decision in *American Pipe* required only that persons who will be included in the class be notified so that they have an opportunity to opt out of the class and thus not be bound by the resulting judgment.

Neither the decision in *American Pipe, supra,* 414 U.S. 538, nor any other authority of which we are aware, requires that persons who are outside the class be notified of that fact.

Plaintiff further contends that any decision holding that class claims seeking tax refunds may not be filed, should be applied prospectively only, because potential claimants reasonably relied upon decisions of the Courts of Appeal which reached a contrary conclusion.

"The general rule that judicial decisions are given retroactive effect is basic in our legal tradition." (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978.) We have stressed that although this rule of retroactivity "has not been an absolute one" (*Id.* at p. 979), exceptions are limited. The circumstance that our decision overrules prior decisions of the Courts of Appeal does not in itself justify prospective application. (*Id.* at p. 986.)

"To determine whether a decision should be given retroactive effect, the California courts first undertake a threshold inquiry: does the decision establish a new rule of law? If it does, the new rule may or may not be retroactive ...; but if it does not, 'no question of retroactivity arises,' because there is no material change in the law. [Citations.]" (*People v. Guerra* (1984) 37 Cal.3d 385, 399.) An example of a decision which does not establish a new rule of law is one in which we give effect "to a statutory rule that the courts had theretofore misconstrued (*People v. Mutch* (1971) 4 Cal.3d 389, 394) ...." (*Id.* at p. 399, fn. 13; *McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975, 981-982.) "Whenever a decision undertakes to vindicate the original meaning of an

enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim. [Citation.]" (*People v. Garcia* (1984) 36 Cal.3d 539, 549.) Accordingly, we conclude that our holding that the Legislature had not authorized, at the time here in question, the filing of class claims seeking refunds of vehicle-license fees and use taxes, should be applied retroactively.

Plaintiff and amicus curiae, Association of California Car Clubs, point out that the parties stipulated in the trial court "that the Court's determination on liability shall bind defendants as to all prospective class members that may be defined by order of Court entered subsequent to the determination of liability," and argue that this stipulation binds the state to provide relief to all members of the class as defined in Woosley's class claim. We do not read this stipulation so broadly.

The apparent purpose of the stipulation was to allow the court to determine the liability issues before deciding whether to certify the case as a class action. The parties stipulated that the determination of liability issues would bind all members of the class as "may be defined by order of Court." This agreement is not inconsistent with a subsequent ruling that the class includes only those persons who have timely filed valid claims. In the event the class as defined is not numerous enough to justify a class action, the stipulation does not mandate that a class be certified.

CONCLUSION

We hold the state violated the commerce clause of the United States Constitution by charging vehicle-license

fees for vehicles originally sold outside California, and use taxes for vehicles purchased from private parties outside California, that were higher than the fees and taxes charged on similar vehicles first sold within California. We also hold that even if the DMV violated the California Administrative Procedure Act (Gov. Code, § 11340 et seq.) when, in November 1976, it altered its practice regarding the collection of use taxes, the proper remedy for such a violation does not encompass a refund of taxes properly due under state law. Lastly, we hold the class claim filed by Woosley was not authorized by statute and thus the class on whose behalf the action is maintained may include only those persons who timely filed valid claims for refund.

Accordingly, we affirm the decision of the Court of Appeal to the extent it holds that the DMV violated the commerce clause of the federal Constitution by imposing higher license fees on vehicles originally purchased in other states and higher use taxes for vehicles purchased from private parties outside California. We reverse the decision of the Court of Appeal to the extent it holds that persons who paid use taxes after November 1976, based on the actual cost of a vehicle, are entitled to refunds (because in November 1976 the DMV ceased its discriminatory practice and began to collect use taxes on all vehicles on this basis).

The cause is remanded for further proceedings consistent with our opinion. In light of our holding, the Court of Appeal shall direct the trial court to amend the description of the class (1) to add to the class those persons who paid higher fees and taxes because of the DMV's application of section 10753.2's depreciation schedule in a fashion different for vehicles originally purchased outside California (see fn. 15, ante, at p. 774), (2) to delete from

the class those persons who paid use taxes after November 1976 (when the DMV ceased its discriminatory practice) based on the actual cost of a vehicle, (3) to delete from the class those persons who paid use taxes on vehicles purchased outside the state from a manufacturer or dealer (because the use tax collected in those circumstances equalled the sales tax collected when a similar vehicle was purchased from a manufacturer or dealer in California), and (4) to delete from the class those persons who have not timely filed a valid claim for a refund. The trial court then shall determine whether, as so defined, an ascertainable class exists for purposes of a class action. Because our opinion will result in a substantial reduction in the amount of the judgment, the trial court shall reconsider the amount of its award of attorney fees to counsel for the class and the amount of its award to Woosley "as fees for services rendered as class representative."[25/] The parties shall bear their own costs incurred before this court.

GEORGE, J.

WE CONCUR:

MOSK, J.

[25/] Because the parties neither have briefed nor argued the issue, we do not review, and thus leave unchanged, that portion of the decision of the Court of Appeal directing the trial court on remand to reconsider whether Woosley is entitled to an award of fees for the legal services he provided in connection with this matter.

PANELLI, J.
ARABIAN, J.
BAXTER, J.
STRANKMAN, J.*
SILLS, J.**

* Honorable Gary E. Strankman, Presiding Justice, Court of Appeal, First Appellate District, Division One, assigned by the Chairperson of the Judicial Council

** Honorable David G. Sills, Presiding Justice, Court of Appeal, Fourth Appellate District, Division Three, assigned by the Chairperson of the Judicial Council.

APPENDIX B

Entered December 31, 1992

Second Appellate District, Division Five, No. B015832

S014557

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CHARLES PATRICK WOOSLEY, Respondent

v.

STATE OF CALIFORNIA ET AL., Appellants

Petition for rehearing DENIED.

Opinion modified.

Lucas, C.J. and Kennard, J. did not participate.

/s/ George

Acting Chief Justice

APPENDIX C

Certified for partial publication*

COURT OF APPEAL OF CALIFORNIA,
SECOND DISTRICT, DIVISION FIVE.

No. B015832

Entered: January 31, 1990

CHARLES PATRICK WOOSLEY, Plaintiff and Respondent,

v.

THE STATE OF CALIFORNIA et al., Defendants and Appellants.

APPEAL from a judgment of the Superior Court of Los Angeles County. Lester E. Olson, Judge. Affirmed in part and reversed in part with directions.

John K. Van de Kamp, Attorney General, Edmond B. Mamer, Philip C. Griffin and
Richard E. Nielsen, Deputy Attorneys General, for Defendants and Appellants.

Charles Patrick Woosley, in pro. per., Donald C. Turpen, Gansinger, Hinshaw, Buckley & Schauer, James M. Gansinger, Busetti & Rolin and John F. Busetti for Plaintiff and Respondent.

This is a class action for taxpayer refunds of excessive vehicle license fees (VLF) and use taxes collected by the Department of Motor Vehicles of the State of California (DMV). It challenges the practice of the DMV in collecting higher taxes on vehicles originally purchased outside California than on similar vehicles originally purchased in California. The trial court ruled in favor of the plaintiff individually and in favor of the class. The court concluded that excessive taxes had been illegally collected and that this is a proper class action for taxpayer refunds, and rendered a judgment against the state for the refunds. The DMV appeals from this judgment, contending that the trial court erred, both on the merits and in certifying the action as a class action. The plaintiff also appeals on a separate issue involving an award of fees.

SUMMARY OF TRIAL COURT RULING

Vehicle license fees are determined in accordance with a formula specified in Revenue and Taxation Code sections 10753 and 10753.2.[1/] Use taxes are also affected

[1/] All section references hereafter are to the Revenue and Taxation Code unless otherwise indicated.

by this formula; for the purpose of use taxes on vehicles purchased other than from a manufacturer or dealer, section 6276 establishes a rebuttable presumption that the sales price is the same as the VLF market value.

In 1967 the Legislature amended section 10753 to provide that the market value for VLF be determined by the California suggested base price established by the manufacturer as shown by the window sticker required by federal law. The DMV erroneously interpreted this section to mean that if the vehicle was first sold outside of California, the suggested base price formula did not apply, and that the market value for purposes of both the VLF and the use tax must be the actual cost price to the purchaser. In addition, the DMV misinterpreted the depreciation schedule in section 10753.2, which begins "with the year first sold to a consumer as a new vehicle," by erroneously concluding that if the vehicle was first sold outside of California, the depreciation schedule would start with the year the vehicle was first registered in California. As a result of these erroneous interpretations, identical vehicles were charged significantly higher VLF and use taxes if they were originally purchased outside of California than if originally purchased in California.

The trial court concluded that DMV's interpretation, resulting in significantly higher fees and use taxes for non-California vehicles, (1) was erroneous and not intended by the Legislature nor required by the statutory language, (2) discriminated against interstate commerce in violation of the federal Constitution and (3) denied the taxpayers equal protection of the law in violation of the federal and state Constitutions. As to

these claims the trial court certified a class (labeled the discrimination class) consisting of "[a]ll persons in the State of California who from within three years prior to October 20, 1977 to the date of refund, were charged and paid more license fees or use taxes for registration of vehicles previously registered or titled outside of the State of California because those fees or taxes were based on the actual cost of those vehicles rather than on the statutorily presumed price, in violation of the Commerce Clause of the Constitution of the United States and of the Equal Protection Clause of the Constitutions of both the United States and California."[2/]

In 1976, pursuant to an interagency agreement with the State Board of Equalization (SBE) the DMV changed its interpretation of section 6276, and began collecting use tax on both California and non-California used vehicles based on the actual cost price to the purchaser, and requiring the purchaser to produce a cost certificate. The trial court held this interpretation contravened the rebuttable presumption in section 6276 that the sales price is the amount determined for VLF purposes. The court held this interpretation was invalid because (1) it was not adopted as a regulation pursuant to the Administrative Procedure Act and (2) it was contrary to the legislative intent of section 6276. For purposes of

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[2/] The three-year period refers to the statute of limitations for tax refunds in section 10901. The liability is ultimately limited by the fact that in 1983, the Legislature amended section 10753 to provide that the DMV shall determine the market value for VLF on the basis of the cost price to the purchaser as evidenced by a certificate of cost.

this ruling the trial court certified a second class (labeled the post-1976 class) consisting of "[a]ll persons in the State of California who since November 14, 1976, have paid excess use taxes for registration of motor vehicles because of the illegal abandonment of the statutory presumption of R&TC Section 6276."

The trial court awarded attorney's fees to class counsel and a special fee to plaintiff Woosley as class representative.

SUMMARY OF OUR HOLDING

We affirm in part and reverse in part with directions. We hold: (1) As to the discrimination class, the trial court correctly held that DMV's procedures imposing higher vehicle license fees and use taxes on vehicles originally purchased in other states were not required by statute, and unlawfully discriminated against interstate commerce in violation of the federal Constitution. We need not consider the equal protection argument. (Pt. I.)

(2) As to the post-1976 class, the trial court correctly held that DMV's 1976 change in practice, by which it began calculating use tax for all vehicles on the basis of cost price to the purchaser, was unlawful and contrary to the intent of section 6276. (Pt. II.)

(3) Various arguments raised by the DMV involving pleadings, exhaustion of administrative remedies, and other technical issues are without merit. (Pt. III, not for publication.)

(4) The trial court did not abuse its discretion in certifying this action as
a class action. (Pt. IV.)

(5) The question of fees for cross-appellant Woosley should be redetermined
by the trial court on remand; if the court determines that Woosley is entitled to attorney's fees, it must then reexamine the overall reasonableness of all attorneys' fees awarded. (Pt. V.)

FACTUAL BACKGROUND

Vehicle License Fees

The VLF is imposed upon the market value of the vehicle and is in lieu of personal property taxes. (§§ 10753, 10758.) Prior to the 1967 amendment to section 10753, the market value was determined "upon the basis of the California delivered prices as established by the manufacturers or distributors in their selling agreements with authorized dealers as of the time the particular make and year model is first offered for sale in California." (Former § 10753, subd. (a); Stats. 1965, ch. 231, § 1, p. 1204.) The DMV obtained this price information from manufacturers by correspondence. The DMV compiled and maintained a loose leaf VLF rate book for virtually all makes, models and years of vehicles built before the 1968 model year, assigning all vehicles to classes of monetary values in $ 200 ranges as contemplated by section 10753.2. All like vehicles, whether California or nonresident, were treated the same in the rate book. There was no discrimination between resident and nonresident vehicles prior to 1967.

The DMV lobbied the Legislature for a change in the method of determining VLF, arguing that manufacturers objected to giving prices and that during the beginning of a model year there were significant delays in obtaining information from the manufacturers by correspondence.

The Legislature amended section 10753 in 1967 to provide a formula based on the "California suggested base price" as "suggested by the manufacturer" as "reflected on the price listing affixed to the vehicle pursuant to the Federal Automobile Information Disclosure Act of 1958." (Former § 10753, subd. (g); Stats. 1967, ch. 435, § 1, p. 1648.)

The DMV dramatically changed its interpretation after the 1967 amendment, claiming that if a vehicle was first sold outside of California, there could be no "California suggested base price." In the absence of a "California suggested base price," contended the DMV, the market value of the nonresident vehicle must be determined on the basis of its cost price to the purchaser.[3/]

[3/] This alternative was based on former section 10753, subdivision (c), which provided, "In the event the department is unable to ascertain the California suggested base price as herein defined in respect to any passenger vehicles by reason of the same being a specially constructed vehicle, or for any other reason, the department shall determine the market value upon the basis of the cost price to the purchaser of the vehicle as evidenced by a certificate of cost, but not including

Although the DMV was already aware that assessing fees based on cost rather than upon manufacturer's suggested base price would result in significantly higher revenues, the DMV commissioned a study to determine the impact of its post-1967 practice of basing VLF for non-California vehicles on cost but for California vehicles on the sticker base price. This study, completed in 1969, showed that "significantly more" fees were assessed by the cost method than the formula or "ratebook" method. The DMV staff noted that the study "emphatically underlines the gross inequities of a dual tax system, 'base price' and 'cost price,' in assessing like vehicles differently, depending on the place of purchase."

Increasing disparity between VLF for nonresident and resident vehicles was shown by certain statistical runs prepared by the DMV in the regular course of business:

	Period	Avg. VLF Per Veh.	Disparity
Nonres.	1/1/74 - 12/31/74	21.17	22.27%
Cal. $ 17.26			
Nonres.	1/75 - 12/3/75	$ 21.65	26.9%
Cal. $ 17.06			
Nonres.	7/1/76 - 12/31/76	$ 35.84	79.9%

California sales or use tax or any local sales or other local tax." (Stats. 1967, ch. 435, § 1, p. 1648. Emphasis added.)

Cal. $ 19.92			
Nonres. Cal. $ 20.59	1/1/77 - 12/31/77	$ 37.54	82.3%
Nonres. Cal. $ 23.29	1/1/78 - 12/31/78	$ 43.17	82.4%
Nonres. Cal. $ 26.35	1/179 - 12/31/79	$ 49.38	87.4%

Depreciation Schedule

Section 10753.2 provided a depreciation schedule by which the market value for VLF purposes was reduced over a nine-year period.[4/] The statute provided for the depreciation schedule to commence "with the year first sold to a consumer as a new vehicle" and made no

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[4/] "The market value of a vehicle for each calendar year of its life, starting with the year first sold to a consumer as a new vehicle," was, for the first year, 85 percent of the midpoint in the class to which the vehicle was assigned; second year, 70 percent; third year, 55 percent; fourth year, 40 percent; fifth year, 30 percent; sixth year, 25 percent; seventh year, 15 percent; eighth year, 10 percent; ninth and each succeeding year, 5 percent. (Former § 10753.2, subd. (c); Stats. 1967, ch. 435, § 2, p. 1649.)

distinction concerning out-of-state vehicles. Nevertheless in 1967 DMV began treating out-of-state vehicles differently than in-state vehicles for purposes of the depreciation schedule. For resident vehicles the depreciation schedule commenced with the year first sold to a consumer as a new vehicle. For out-of-state vehicles, the DMV commenced the depreciation schedule with the date of sale to the first person to register the vehicle in California.

This practice also resulted in higher VLF for a nonresident vehicle, throughout the depreciable life of the vehicle.[5/] The court found "[i]f a nonresident vehicle starts higher on the depreciation schedule, except in rare cases not relevant to this action, the nonresident vehicle is assessed overall higher fees in the succeeding years."

[5/] An example given by the trial court assumed two identical vehicles with a suggested base price of $ 4,250 on January 1, 1970, and a fair market value of $2,495 on January 1, 1973. One vehicle was originally sold and registered in California and the other was not. The California vehicle would be in a classification based on its 1970 suggested base price of $4,250, and if sold to the next consumer on January 1, 1973, would be in its fourth year on the depreciation schedule and would have a VLF of $ 34 in 1973. The nonresident vehicle, however, first registered in California in 1973, would have its market value based upon its cost price of $ 2,495 and would be on the first year of the depreciation schedule, and would pay a VLF for 1973 of $ 42. Over the nine-year period 1973 to 1982, the resident vehicle would pay a total of $ 103 VLF, while the nonresident vehicle would pay a total of $ 167 VLF.

DMV intimated at trial that the distinction was necessary, or at least administratively convenient, on the ground that the year an out-of-state vehicle was first sold to a consumer could not be determined. The trial court found that DMV presented no evidence to support this assertion.

The DMV did argue, however, that a 1977 amendment to section 10753.2 validated the DMV interpretation. That amendment provided that the depreciation schedule would start "with either the year the vehicle was first sold to a consumer as a new vehicle or the year the vehicle was first purchased or assembled by the person applying for original registration in this state." (Stats. 1977, ch. 821, § 1, p. 2491.)

After examining the legislative history, however, the trial court found that the 1977 amendment was intended to apply only when there was never a sale to a consumer as a new vehicle, as in the case when a person assembles his own vehicle, uses it and then sells it. In other words, the amendment was intended "to remove the confusion as to when the depreciation schedule started if a vehicle were constructed by the owner or where the person purchased a homebuilt vehicle," but the legislative history "indicates no intent on the part of the legislature to treat vehicles purchased out-of- state any differently than vehicles originally purchased in California."

Use Taxes

Use taxes are a complement to sales taxes. Vehicles are an exception to the general rule that private party transactions are not subject to tax. Use tax is

charged when a person buys a vehicle from a private party or purchases a vehicle out of state and brings it into the state. Pursuant to agreement between the DMV and the SBE the DMV collects the use tax on behalf of the SBE. The use tax must be paid to the DMV in order to register a vehicle.

The use tax is based on the sales price, but section 6276 establishes a rebuttable presumption that the sales price is an amount equal to the market value as determined to measure VLF.

Thus, the DMV's post-1967 practice of treating out-of-state vehicles differently than California vehicles in determining the market value for VLF, also resulted in higher use tax on used vehicles purchased from a private party outside this state than for a similar purchase inside this state.

Facts Concerning Plaintiff Woosley's Individual Claim

In March 1976, Mr. Woosley, a California resident, purchased a 1936 Auburn Speedster in North Carolina for a price of $ 25,000. Based on the purchase price, he was charged a VLF of $ 427 and a use tax of $ 1,500. Had he purchased the same vehicle in California, the VLF would have been $ 2 and the use tax would have been $ 6 because these taxes would have been computed from the DMV rate book based on the vehicle's 1936

price and by applying the presumption of section 6276.[6/]

1976 Interagency Agreement

In 1976 the DMV entered an interagency agreement with SBE that, effective November 15, 1976, in collecting the use tax the DMV would require in all private party transactions, both resident and nonresident, that the purchaser produce a certificate of cost and that the use tax be based upon actual cost rather than the presumed VLF market value.

I

THE DISCRIMINATION CLASS

Discussion

The trial court found factually that significantly higher vehicle license fees, as well as use taxes prior to November 15, 1976, were charged on a vehicle which was first sold or registered in another state than on an identical vehicle first sold in California. From the facts found, the trial court properly concluded that this form of discrimination, based on the place of origin of the vehicle, was not required by the statute, and in any event violated the interstate commerce clause of the federal

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[6/] Although Mr. Woosley's individual claim is unusually large because he purchased a valuable antique, the trial court found that the discrimination was also significant for average vehicles.

Constitution.

Statutory Interpretation

The justification given for DMV's policy was that a vehicle purchased outside California had no "California suggested base price" and therefore the alternative cost method was demanded because the DMV "is unable to ascertain the California suggested base price."

This argument is not persuasive. The prior version of the statute was very similar in these respects, and the DMV did not discriminate between resident and nonresident vehicles under the prior statute. The 1965 version of section 10753 stated in subdivision (a) that market value shall be determined based on " California delivered prices as established by the manufacturers or distributors in their selling agreements with authorized dealers as of the time the particular make and year model is first offered for sale in California ...." The 1965 version similarly had an alternative subdivision (c) for determining market value on the basis of cost price to the purchaser "[i]n the event the department is unable to ascertain the California delivered price." (Stats. 1965, ch. 231, § 1, p. 1204.)

The 1967 amendment substituted "California suggested base price as herein defined" for "California delivered prices." DMV offers no legislative history or persuasive argument why the Legislature would have intended this amendment to impose sharply different bases for determining market value depending solely on the point of origin. It is more likely the Legislature intended that the same presumptive market value, the California

suggested base price, be used regardless whether the vehicle was first sold in another state. This is the administratively convenient method and the one which equitably treats similar vehicles with similar tax.

The DMV's next main argument is a theoretical one. It contends there is no discrimination because whether the cost basis is higher or lower than the formula basis depends on "the individuality of each sales transaction." This argument has a theoretical logic but it flies in the face of the trial court's findings and DMV's own study showing that in its actual operation the cost method resulted in significantly higher fees.

Interstate Commerce

Under the interstate commerce clause of the United States Constitution (art. I, § 8, cl. 3), a state's tax system may not discriminate against interstate commerce by imposing a higher tax burden on commerce coming into that state from another state. (*Ex parte Thomas* (1886) 71 Cal. 204; *Welton v. State of Missouri* (1875) 91 U.S. 275, 282; *Guy v. Baltimore* (1879) 100 U.S. 434, 439; *Walling v. Michigan* (1886) 116 U.S. 446, 454; *Darnell & Son v. Memphis* (1908) 208 U.S. 113, 120; *Armco Inc. v. Hardesty* (1984) 467 U.S. 638, 642.)

A use tax on goods brought into a state, as a complement to that state's sales tax, is permissible, but only if it operates equally between in-state and out-of-state purchases. (*Henneford v. Silas Mason Co.* (1937) 300 U.S. 577, 583-584; *Halliburton Oil Well Co. v. Reily* (1963) 373 U.S. 64, 69-70; *Boston Stock Exchange v. State Tax Comm'n* (1977) 429 U.S. 318,

330-332.)

In determining whether a statute unlawfully discriminates against interstate commerce, courts look both to the face of the statute and its practical operation. (*Best & Co. v. Maxwell* (1940) 311 U.S. 454; *Memphis Steam Laundry v. Stone* (1952) 342 U.S. 389, 395; *Nippert v. Richmond* (1946) 327 U.S. 416, 431-432; *Halliburton Oil Well Co. v. Reily, supra*, 373 U.S. at p. 69.) Even though tax rates may be equal, discriminatory effect may be caused by differences in exemptions or credits or the manner in which the tax is calculated. (*Halliburton Oil Well Co. v. Reily, supra*, 373 U.S. at p. 67; *Maryland v. Louisiana* (1981) 451 U.S. 725, 756; *Westinghouse Elec. Corp. v. Tully* (1984) 466 U.S. 388, 400, 405.) It need not be shown that the statute has a protectionist purpose in order to conclude that it discriminates against interstate commerce in practical effect. (*Nippert v. Richmond, supra*, 327 U.S. at p. 434; see *Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. 263, 270.)

Here, the DMV's interpretation on its face treated out-of- state vehicles differently. The trial court found factually that in practical effect these distinctions imposed significantly higher VLF and use taxes on out-of-state vehicles. The trial court properly concluded from the facts found that this tax system discriminated against interstate commerce in violation of the federal Constitution.

On appeal the DMV argues that the commerce clause does not apply to this case. DMV suggests that interstate commerce is not involved, or is not significant,

or that the "competition" involved is not significant. There is no merit to these arguments.

"Commerce" has been broadly defined since the early interpretation of the interstate commerce clause. (*Gibbons v. Ogden* (1824) 22 U.S. (9 Wheat.) 1, 189.) Transactions may be commerce even if noncommercial. (*U.S. v. Underwriters Assn.* (1944) 322 U.S. 533, 549.)

DMV argues that the commerce clause does not apply at all, because Mr. Woosley was a consumer not involved in the business of buying and selling vehicles. The case cited by DMV, *J. C. Penney Co. v. Hardesty* (W.Va. 1980) 264 S.E.2d 604, 613, is distinguishable factually because it involved a claim for a credit on taxes paid previously when the taxpayer was a resident of another state. Here Mr. Woosley was a resident of California when he purchased the vehicle in North Carolina and he complains he was charged more California taxes, solely because he bought the vehicle in North Carolina, than if he had bought it in California.

The DMV's argument that no significant interstate commerce is involved in vehicles purchased in other states is contrary to the factual findings of the trial court. Even if we limit our consideration to purchases from private parties in other states, the DMV offers no evidence that this commerce is insignificant, and the trial court found otherwise.

If a tax has a protectionist purpose to discriminate against interstate commerce, courts do not attempt to determine the amount of commerce involved or to measure the anti-competitive effect. (*Bacchus Imports Ltd. v. Dias, supra*, 468 U.S. at p. 269; *Westinghouse*

Elec. Corp. v. Tully, supra, 466 U.S. at pp. 406-407; *Maryland v. Louisiana, supra*, 451 U.S. at p. 760.) Even assuming the tax in this case was not so intended, it distinguished on its face between vehicles based on the state of purchase, and the court found that its practical effects discriminated against out-of-state purchases. This is sufficient to merit commerce clause analysis. (*Matthews v. State, Dept. of Revenue* (Colo.1977) 562 P.2d 415, 417.)[7/]

[7/] Other cases cited by DMV are inapplicable. In this case, there is no suggestion that there is any legitimate local regulatory purpose in charging higher VLF and use taxes on vehicles originally purchased out of state than on vehicles purchased in state. (See *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142; *Lewis v. BT Investment Managers, Inc.* (1980) 447 U.S. 27, 36-37; *Maine v. Taylor* (1986) 477 U.S. 131, 140; *Philadelphia v. New Jersey* (1978) 437 U.S. 617, 623-624, 626-627; *Hughes v. Oklahoma* (1979) 441 U.S. 322, 336.)

Nor is this a case involving a tax on those engaged in interstate commerce to compel them to pay their just share of a state's tax burden, such as fees for interstate carriers using a state's highways. Even those taxes must be fairly apportioned, must not discriminate against interstate commerce, and must be fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279; *American Trucking Associations, Inc. v. Scheiner*(1987) 483 U.S. 266 [97 L.Ed.2d 226, 107 S.Ct. 2829, 2846- 2847]; *Goldberg v. Sweet* (1989) 488 U.S. 252, 260-261 [102 L.Ed.2d 607, 616, 109 S.Ct. 582, 588].) There is no suggestion here that vehicles purchased elsewhere impose a greater burden on this state's transportation system so as to justify a higher tax than on vehicles originally purchased here.

II

THE POST-1976 CLASS

The trial court ruled that in 1976 the DMV invalidly changed its interpretation of section 6276 by abandoning the presumption of sales price contained in that section and calculating use tax for all vehicles on the basis of actual cost.

The general rule for use tax is that the tax is based on the sales price of the product. Since 1965, section 6276 has provided a rebuttable presumption about the sales price when the product is a vehicle. As originally enacted, section 6276 provided in pertinent part, "[T]he sales price shall be presumed to be its market value at the time of the purchase as that value is determined to measure vehicle license fees .... The presumption may be rebutted by evidence which establishes that the sales price was other than such market value." (Stats. 1965, First Ex. Sess., ch. 2, § 14, p. 5449.)

From 1967 until November 1976, the DMV did not ask taxpayers to present a bill of sale or other documentation of cost for the purpose of assessing use tax on California vehicles. The DMV discouraged presentation of such documents unless beneficial to the taxpayer, and assessed use tax on California vehicles based on the presumed market value under section 6276. This was contrary to the SBE's position that the DMV should assess use tax on resident vehicles based on cost,

not presumed value, as it did on nonresident vehicles. Cost basis assessments generally result in higher tax revenues than presumed market value assessments. The DMV opposed this position, claiming it would require additional administrative effort.

In a series of meetings beginning in 1971, DMV and SBE attempted to agree upon a joint legislative proposal to increase use tax revenues. A bill was introduced to repeal the formula-based presumed market value and to base use taxes exclusively on cost. The Legislature did not pass this bill. DMV and SBE then agreed upon and supported another proposed amendment to section 6276 which would increase use tax revenues by multiplying the presumed market values by 1.2 for noncommercial vehicles and by 1.8 for commercial vehicles. This amendment was passed by the Legislature, effective January 1, 1972.

Despite the lack of legislative support, SBE persisted in trying to convince DMV to collect use tax based on cost rather than presumed market value. DMV resisted, claiming that method would slow department processing and create additional inconvenience to applicants. Internal memoranda in April and June of 1973 also show that DMV recognized that SBE's desired change in use tax computation from presumed market value to purchase price would require new legislation. SBE continued to pressure DMV to change its use tax computation method. Finally, in 1976, DMV and SBE entered into an interagency agreement whereby DMV agreed that in performing its function of collecting use tax on behalf of the SBE, it would in every case rebut the market value presumption by requiring a certificate of

cost from the registrant showing the actual sales price, thereby establishing that the sales price was other than the presumed market value. The trial court held that this change in practice violated and misinterpreted section 6276 and was procedurally defective because it was adopted by interagency agreement rather than by a formal regulation pursuant to the Administrative Procedure Act. We agree.

Statutory Interpretation

Under section 6276, as it read in 1976, whenever the purchaser of a vehicleis required to pay use tax to the DMV, "the sales price shall be presumed to be an amount equal to the market value of the vehicle at the time of the purchase as that value is determined to measure vehicle license fees imposed under Part 5 ... of Division 2, multiplied by a factor of 1.2 for a noncommercial vehicle, including a passenger vehicle .... [¶] The presumption may be rebutted by evidence which establishes that the sales price was other than [such] amount."

"In construing the words of a statute or constitutional provision to discern its purpose, the provisions should be read together; an interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning." (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.) The interpretation of section 6276 contained in the 1976 interagency agreement between SBE and DMV runs aground of this very basic tenet of statutory construction. By requiring proof of actual sales price in every case,

they have rendered the presumption of market value absolutely useless. In no case is the presumption utilized to determine the amount of use tax, since under the agreement DMV requires a certificate of cost, signed under penalty of perjury, from all registrants; DMV penalizes any taxpayer who fails to comply with this requirement by refusing to register the vehicle. This interpretation of section 6276 renders the entire presumption of market value meaningless, makes that language surplusage, and is thus incorrect.

A further indication that such interpretation is erroneous is the DMV's interpretation of the statute for the nine years prior to the 1976 interagency agreement. During that period, DMV consistently relied on the statutory presumption of market value unless the taxpayer chose to rebut it with evidence of the actual sales price; DMV did not otherwise require that information. This long-standing administrative construction of section 6276 by the agency charged with its enforcement is entitled to great weight. (*Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 738.) No change in the statute occurred in 1976 to justify the entirely new administrative interpretation set forth in the interagency agreement.

We also find it highly significant that, as DMV admits, up until 1983 the Legislature consistently rejected proposals to amend section 10753 to provide for use tax assessments based on actual sales price. Instead the Legislature adjusted the presumed market value by providing in section 6276 that such amounts should be multiplied by 1.2 for noncommercial vehicles and 1.8 for commercial vehicles. The failure of the Legislature to

change the law in a particular respect when the subject is generally before it and when it makes changes in other respects is indicative of an intent to leave the law as it stands in the aspects not amended. (*Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 252.) It seems clear to us that the Legislature intended that the DMV continue to utilize the market value presumption to determine the amount of use taxes when it refused to amend the statute to provide for assessments based solely on actual sales price and instead adopted an alternate method to increase use tax revenue.

DMV relies on an opinion by the Attorney General in arguing that their interagency agreement was a correct interpretation of the statute. We find no such indication in that opinion. Prior to the 1976 agreement, SBE requested an opinion from the Attorney General regarding this statute, asking first whether SBE and DMV, as well as the taxpayer, could rebut the presumption of "sales price" contained in section 6276. The opinion concluded that the statute does not limit which party may rebut the presumption; thus SBE, DMV or the taxpayer may rebut the presumption with appropriate evidence of actual sales price. The second question posed by SBE was whether, if a true, larger sales price comes to its attention, it must make a determination of additional taxes. This question was answered in the affirmative. The last question presented was whether the presumption in section 6276 may be relied upon in collecting use tax without any attempt to establish and collect use tax measured by the actual sales price. Noting that the presumption is one affecting the burden of producing evidence, the opinion explained that

"such a presumption requires one 'to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. ...' (Evid. Code, § 604; emphasis added.) Exclusive reliance on the presumption therefore would appear to conform with the legislative intent in enacting section 6276 as a means of expediting the collection of the use tax." (59 Ops.Cal.Atty.Gen. 47, 49-51 (1976).)

We find no fault with these conclusions. However, the opinion does not address whether DMV and SBE could completely disregard the presumption in establishing and collecting use tax, and it provides no support for such policy. The opinion does consider an earlier interagency agreement, dated December 26, 1973, which provided in pertinent part that: " 'The Department shall compute the use tax on a vehicle required to be registered or subject to identification measured by the sales price of the vehicle. In the absence of a bill of sale or other documented evidence of the sales price, the sales price of a vehicle required to be registered, other than one purchased outside the State from the manufacturer or a vehicle dealer, is presumed to be the market value of the vehicle as that value is determined by the Department to measure the license fee ... as provided by section 6276 of the Revenue and Taxation Code. This presumption of the sales price of the vehicle may be rebutted by evidence which establishes that the sales price was other than such an amount.' " (59 Ops.Cal.Atty.Gen. 47, 49, fn. 2; italics omitted.)

From this agreement, the Attorney General concludes that "DMV and the Board have agreed that DMV has the responsibility to first seek

evidence establishing the actual sales price, and only if such evidence is not available do they resort to the presumption referred to in section 6276." (59 Ops.Cal.Atty.Gen. 47, 49, fn. 2.) We do not reach the same conclusion. The 1973 agreement recognizes that where other evidence of sales price is produced, that is the amount upon which the use tax shall be computed; in the absence of evidence of actual sales price, the presumed price is the amount to be used for computing use tax. The 1973 agreement does not require DMV to seek evidence to establish the actual sales price, and the Attorney General's statement to the contrary lends nothing to the issue currently before this court.

The trial court correctly ruled that the interagency agreement was an invalid interpretation of section 6276.

Improper Regulation

We also agree with the trial court's ruling that DMV's 1976 change in practice was procedurally defective because it was adopted by interagency agreement rather than by a formal regulation pursuant to the Administrative Procedure Act. (Gov. Code, § 11340 et seq.)

Government Code section 11342 defines "Regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. ..." The 1976 interagency agreement provided that DMV was to

compute use tax measured by the sales price of the vehicle, which can be established by a bill of sale, other documentation of sales price, or a certificate of cost signed by the purchaser of the vehicle. This provision constitutes both an interpretation of section 6276 and a procedure for implementation of that section. The trial court correctly concluded that the agreement is a regulation subject to the requirements of the Administrative Procedure Act.

The Act requires state agencies to provide notice of proposed regulations as well as the opportunity for public hearing or comment on the proposal. (Gov. Code, §§ 11346, 11346.8.) The undisputed facts at trial established that DMV and SBE did not comply with the procedural requirements of the Act in implementing their interagency agreement. Under Government Code section 11350, any interested person may bring an action for declaratory relief in order to obtain a judicial declaration as to the validity of any regulation; such regulation may be declared invalid for a substantial failure to comply with the provisions of the Administrative Procedure Act. The trial court had ample basis to declare the interagency agreement invalid for failure of the agencies to comply with procedural requirements.

The more important ground for declaring the agreement invalid, however, is that it is in conflict with the statute it seeks to interpret and implement. Government Code section 11342.2 provides that: "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is

valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."

As we have discussed at length, supra, the 1976 interagency agreement essentially repeals the presumption of market value contained in section 6276. Such an interpretation is in direct conflict with the statute it seeks to implement, and thus must be declared invalid.

III

PLEADING AND EXHAUSTION ISSUES

DMV contends that plaintiff failed to exhaust administrative remedies with regard to the class action on the use tax, and that various issues decided by the trial court were not within the scope of the claim for refund or of the complaint. These contentions are meritless.

Plaintiff filed a claim for refund, on behalf of himself and all other persons similarly situated, on October 20, 1977. On March 7, 1978, he filed an amended claim with DMV and with SBE, reflecting additional taxes he had paid under protest in the meantime. On May 3, 1978, W. E. Burkett, Tax Counsel for the SBE, to whom the claim had been referred for review and recommendation, wrote to plaintiff that the claim would be denied, explaining in detail the contention that the presumption of section 6276 could be rebutted, citing the Attorney General's opinion. Plaintiff was given formal notice that the State Board of Control had rejected his claim on May 16, 1978, and that

the SBE had rejected his claim on June 7, 1978. This action was filed June 20, 1978.

Although it was conceded at trial that plaintiff exhausted administrative remedies as to vehicle license fees, both individually and on behalf of the class, and that plaintiff exhausted administrative remedies individually as to use tax, DMV contends that the claim on behalf of the class for refund of use tax was not acted upon administratively and that the filing of the complaint was therefore premature.

This contention misconstrues the record and in any event lacks merit. DMV selectively quotes the letter from W. E. Burkett to suggest that the class claim was not acted upon. A fuller quotation shows that it was. DMV quotes the following paragraph but omits the last sentence which we have emphasized: "Our records do not provide the means for identifying the persons who are similarly situated and for whom you seek a refund as a class. If you have the means of identifying each person similarly situated, we will be pleased to provide them with a ruling relative to the merits of their claim. If the underlying facts are the same as your claim, it would be our conclusion that no refund id due." (Emphasis added.) In substance, the class claim was also denied. Nothing in the subsequent formal notices of rejection suggested that the class portion of the claim was reserved for futhre decision.

Moreover, DMV's contention is based on the assumption that plaintiff should have waited six months after his amended claim of March 7, 1978, before filing a

complaint in court. DMV relies upon section 6934.[8/] However, the original claim was filed on October 20, 1977, which was treated as the date of claim in SBE's formal rejection of the claim. The complaint was filed more than six months after October 20, 1977, and was not premature under section 6934.

DMV next lists various issues which it contends were not within the scope of plaintiff's claim for refund or were not properly pleaded. The record shows to the contrary, that these issues were raised or implied by the claim or raised by DMV and SBE themselves in denying the claim and were litigated without objection at trial.

The purpose of the claims requirement is to give the government fair notice and an opportunity to resolve claims administratively, not to revive elaborate pleading requirements or provide a trap for the unwary claimant. In this case the claim and amended claim filed by plaintiff Woosley are probably far more precise and specific than the average taxpayer refund claim.

In his claim filed October 20, 1977, plaintiff Woosley protested the calculation of license fees "using a value higher than that determined by applying Section

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[8/] Section 6934 provides: "If the board fails to mail notice of action on a claim within six months after the claim is filed, the claimant may, prior to the mailing of notice by the board of its action on the claim, consider the claim disallowed and bring an action against the board on the grounds set forth in the claim for the recovery of the whole or any part of the amount claimed as an overpayment."

10753.2 to the amount determined under Section 10753(a), because said vehicles had been previously registered or titled outside the state of California" and "the practice of the DMV to apply Section 10753(c) rather than 10753(a) to vehicles previously registered outside of California." He asserted "[t]his practice is not a correct interpretation of the statute. Further, the practice violates the interstate commerce clause of the United States Constitution." In his amended claim filed March 7, 1978 with DMV he was even more specific that the practice of commencing the depreciation schedule of scetion 10753.2 for out-of-state vehicles with the year the current owner purchased it rather than commencing with the year the vehicle was first sold to a consumer was not a correct interpretation of the statute and violated the interstate commerce clause. In the amended claim filed with SBE on March 7, 1978, plaintiff contended that the presumption of section 6276 was erroneously denied to him solely because the car was purchased outside of California. This claim also made reference to the November 15, 1976 change in practice by the DMV requiring affidavits of sale price on most private purchases. He contended that "the new practice is an unauthorized change in the statutory scheme of which Revenue & Taxation Code Section 6276 is an integral part." In his December 9, 1976 letter to the DMV which was an exhibit to his formal claim, he stated that the practice to accept the presumption of section 6276 for California cars but to demand an affidavit of value for vehicles last registered outside of California was "discriminatory and in violation of the Commerce clause of the U.S. Constitution. I am entitled to the same treatment on my car as I would have received if I had purchased the car in California."

In light of the specific statements in plaintiff's claim, it is ludicrous for DMV to argue that the claim did not raise the following issues: Interstate commerce clause, equal protection, commencement of depreciation schedule, interpretation of section 6276, validity of requiring a certificate of cost, and validity of the November 15, 1976 change in practice.

DMV argues that plaintiff's claim did not raise the specific legal theory that the 1976 interagency agreement was invalid because not enacted by a regulation, or the theory that requiring a certificate of cost is the equivalent of requiring a tax return. Those theories, however, are merely legal arguments, explanations or reasoning in rebuttal to arguments raised by DMV and SBE that the practice of requiring a cost certificate was proper under section 6276. (See, *Duffy v. State Bd. of Equalization* (1984) 152 Cal.App.3d 1156, 1163.)

DMV contends that plaintiff did not state a valid cause of action for interstate commerce discrimination in calculation of the use tax because plaintiff paid use tax after the November 15, 1976 change in practice which eliminated the differential by requiring a cost certificate on all vehicles. This contention is opposite to DMV's position at trial which argued that plaintiff could not represent the post-1976 class because he paid tax before the change. The record supports the conclusion that plaintiff was in the unusual position of having paid part of the tax before November 15 and part after November 15, 1976. The trial court was fully satisfied that plaintiff adequately represented the classes involved in this suit.

OTHER TECHNICAL ISSUES

DMV raises three specific technical issues. We find none of them meritorious.

Dealer Added Options

DMV contends that dealer added options should be included in the suggested base price. The trial court properly rejected this contention as inconsistent with the statutory definition of suggested base price.

Former subdivision (a) of section 10753 provided that market value be determined "upon the basis of the California suggested base price as herein defined and as established by the manufacturers." Former subdivision (g) provided that "as used in this section, 'suggested base price' means the retail price of the vehicle suggested by the manufacturer, plus destination charge and emission control devices . . . as reflected on the price listing affixed to the vehicle pursuant to the Federal Automobile Information Disclosure Act of 1958, but does not include the retail delivered price suggested by the manufacturer for each accessory or item of optional equipment physically attached to such vehicle at the time of its delivery to such dealer which is not included within, but is separately added to, the retail price of such vehicle as suggested by the manufacturer." (Emphasis added.)

As pointed out by the trial court, "[t]here is no apparent way that a manufacturer can suggest a price that includes accessories added by anybody else, such as the dealer. Since added accessories are by very definition not part of a price suggested by the automobile manufacturer,

the statute did not need to exclude them"[9/]

DMV contends that including dealer added options is justified by former section 10753, subdivision (d), now subdivision (b) which provides "[i]n the event any vehicle is modified or additions are made to the chassis or body at a cost of two hundred dollars ($200) or more, but not including any change of engine of the same type or any cost of repairs to a vehicle, the owner of such vehicle shall report any said modification or additions to the department and the department shall classify or reclassify the vehicle in its proper class . . . ."

DMV has not shown that the trial court erred in holding that this section does not require reclassification for ordinary dealer added options. The court found that according to contemporaneous administrative construction by the DMV itself, this section refers to modifications which materially alter the original construction of the vehicle, changing its configuration significantly.

Bills of Sale

DMV contends that "those members of the class

[9/] In addition, since the statute refers to the price listing affixed to the vehicle pursuant to the federal act, and the federal act requires the window sticker to include the retail delivered price suggested by the manufacturer for each accessory or item of optional equipment physically attached to the automobile at the time of its delivery to such dealer, (15 U.S.C. § 1232(f)(2)), the Legislature could not have intended that the base price include options added by the dealer after delivery.

who furnished bills of sale or other evidence of sales price other than a certificate [of cost] must be excluded because they rebutted the presumption."

This contention is unpersuasive because it is unreasonable to believe that a taxpayer would voluntarily rebut the presumption to the taxpayer's own disadvantage. It is more reasonable to assume that if a taxpayer produced other evidence than a certificate of cost it was because of the underlying policy that DMV could require a certificate of cost.

Nonpassenger Vehicles

DMV contends "the vehicles included in this case [are] limited . . . to automobiles and housecars" and that the trial court erred in including other types of vehicles in the judgment.

Contrary to DMV's contention, plaintiff's claim for refund and his complaint were not specifically limited to passenger vehicles but used the broader term motor vehicles. DMV raises this objection for the first time on appeal. DMV did not object at trial or even after the filing of the trial court's proposed statement of decision, that the court's three-page discussion of vehicles other than passenger vehicles was beyond the scope of the suit.

DMV's argument based on section 10753 is not persuasive because it assumes the validity of several other DMV arguments on appeal.

IV

CLASS ACTION ISSUES

DMV argues the trial court erred in certifying this action as a class action. Under headings such as "no substantial benefit to the class" or "unmanageability," DMV contends that the amount of the average refund would be small and that the costs and burdens of providing refunds would be large. DMV asserts that it would be difficult for class members to establish the amount of damages, that the burden of searching computer records and hard copy records for the numerous members of the class[10/] would be excessive in relation to the amount of refunds, and that many of the members could not be found and those refunds "would undoubtedly escheat to the State of California" anyway.

If there were any factual basis for these assertions, they would cast serious doubt on the desirability or suitability of maintaining such a large class action for such little benefit. (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 386.) The trial court, however, found all the facts to the contrary. In its 68-page statement of decision certifying the class action, the trial court thoroughly considered these arguments, and found there was no factual basis for the assumptions underlying DMV's argument.

DMV's assertion that the individual refunds would

[10/] The trial court's statement of decision certifying the class action estimated there are 2.8 million persons in the discrimination class and 14 million persons in the post-1976 class.

be small was rejected by the trial court as inconsistent with the court's findings of significantly higher VLF on out-of-state vehicles and dramatic increases in revenues from the 1976 change in practice. The court pointed out that the average differential in VLF was $ 23 in 1979 increasing to $ 32 in 1983; that at the certification hearing the defendants admitted that the average VLF recovery would be $ 80 to $ 90; and that in another proceeding the state had estimated that a total of $ 100 million would be refunded if the trial court's interpretation of the post-1976 change in practice were upheld.

Contrary to DMV's assertions that a costly claim form procedure would be required and that the class members would have difficulty substantiating their claims, the trial court found that defendants had the ability, all from records presently available to them, to identify each member of the class, to determine the fact and the amount of overpayment, and to make a refund to the member's last known address. Thus claim forms from the members of the class would not be necessary.

The trial court also rejected DMV's assertion that it would be difficult or impossible to determine the base price of vehicles so as to calculate the amount of overpayment. The court found that DMV's existing VLF rate book could be used for model years before 1968 and that numerous publications such as the Kelley Blue Book contain accurate information of manufacturer's suggested retail prices.

The court reviewed in great detail the record-keeping processes of DMV and rejected DMV's

assertions that the cost of identifying the members and calculating the refunds from these records would be excessive in relation to the amount of refunds.

Part of DMV's claim of excessive burden was that in order to fully identify the members and the amounts due, it would be necessary manually to review hard copy records, not merely computer records. The court rejected as not credible several of DMV's estimates of the cost of this procedure.

DMV does not argue that a class action for taxpayer refunds is never appropriate, nor could it.[11/] Unlike the rule in some other states, class actions for taxpayer refunds have been approved in California, including precedent by the Supreme Court which we are bound to follow. (*Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 796- 797; *Santa Barbara Optical Co. v. State Bd. of Equalization* (1975) 47 Cal.App.3d 244, 247, 249; see *Lattin v. Franchise Tax Board* (1977) 75 Cal.App.3d 377, 381; *Schoderbek v. Carlson* (1980) 113 Cal.App.3d 1029, 1034-1037.)[12/] Rather, DMV

[11/] Surprisingly, DMV does argue that injunction or mandamus would have been superior remedies to a class action for refunds. It is well established that injunction, mandamus, or other forms of equitable process are not available to prevent the collection of tax. (Cal. Const., art. XIII, § 32; Rev. & Tax. Code, § 6931.)

[12/] See Annotation, Propriety of Class Action in State Courts to Recover Taxes (1981) 10 A.L.R.4th 655.

contends that this class action was improper because it is too big, the refunds are too small, and the benefits are not substantial in comparison to the costs of providing them. These are factual issues, and the trial court resolved all the facts against DMV. DMV's legal arguments are based on factual assumptions the trial court found to be untrue, and DMV does not claim that there is no substantial evidence to support the trial court's findings. The trial court's order certifying the class action is within its discretion and is supported by substantial evidence. In the absence of other error we have no power to reweigh the evidence or substitute our discretion for the trial court's. (*Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470 [174 Cal.Rptr. 515, 629 P.2d 23].)

V

CROSS-APPEAL

In light of the judgment for tax refunds entered in favor of the two classes, the trial court awarded attorney's fees to the attorneys for the class, under the "common fund" principle, which provides that a party who preserves or recovers a fund for the benefit of others in addition to himself is entitled to recover his costs, including his attorney's fees, from the fund. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 35 [141 Cal.Rptr. 315, 569 P.2d 1303] [hereafter *Serrano III*].) Class counsel was awarded fees of $ 12 million, and former counsel was awarded fees of $ 1.7 million. Plaintiff Woosley was

awarded $ 1 million "as fees for services rendered as class representative." Woosley cross-appeals from that portion of the judgment fixing the amount of his fee award, asserting that such award improperly denied him attorney's fees for the legal assistance he rendered to the class and compensated him solely as class representative. We find his claims have merit and remand the matter for redetermination of attorney's fees.

After the court had rendered its decisions regarding liability and class certification, Woosley, who is an attorney and certified tax specialist, moved to have his appearance formally entered as cocounsel of record for the class. He asserted this would enhance his ability to represent the class and would assure that the record accurately reflected the extent of his participation in the case. At the hearing on the motion, counsel for DMV stated, "I am well aware of the fact that he [Woosley] has been acting as an attorney in the case." Counsel for the class also acknowledged Woosley's contribution: "We have marched with this case through seven years, and Pat has done a lot of work on this case--no question about it. And the value of his work in light of his specialty as a tax specialist has been beneficial."

The trial court denied the motion, finding there was really nothing Woosley could provide by way of class representation as counsel that he could not provide as continuing class representative. The court found there was "a vague kind of potential downside" and "no up side" to granting Woosley cocounsel status at that late stage in the case. The court noted that "Mr. Woosley has contributed both legally and factually, but there is no indication that could not continue." In closing, the court

gave this assurance to counsel for Woosley: "[I]f he is concerned about compensation as matters get to a close, although matters getting to a close have got to be put within quotes, who knows how much longer this lawsuit will continue. He is perfectly, totally protected in that regard because the matter of compensation of both counsel and the class representative will be up to the court at the appropriate time."

Three weeks later, applications for award of attorney's fees were filed by former class counsel Jones, Bell, Simpson & Abbott; by current class counsel Gansinger & Pick and John F. Busetti; and by Patrick Woosley. All three applications were supported by declarations regarding the number of hours worked by the attorneys on various aspects of this case and the appropriate hourly fee for that attorney's work as well as detailed descriptions of the complexity of the work involved. The application of current counsel suggested that the court use a multiplier of 13 for calculation of the award.

DMV filed opposition, asserting that the declarations were insufficient to support the amount of fees claimed in the absence of the detailed time sheets of current counsel. DMV asserted that counsel should provide detailed time records and justification for time expended, after which the court should determine reasonable hours and reasonable hourly rates. They also recommended that if the court found it proper to use a multiplier to determine fees, then 1.32 would be appropriate.

At the hearing on these applications, the court

stated that additional substantiation was not necessary, inasmuch as the requested fee, including the request of class representative Woosley, would amount to less than 2 percent of the judgment. The court took the motions under submission, explaining: "The court intends to grant the motions substantially in the form as requested. Although we could attempt to augment the record further, I think it is certainly sufficient, and the court is satisfied with the factual support for the motion."

Current counsel noted that no multiplier had been suggested by former counsel, and thus suggested that whatever multiplier the court felt reasonable for current counsel be applied equally to former counsel's fees as well. The court asked for a letter containing that calculation. Woosley asked if the court needed any calculations from him, and the court said no. Current counsel added: "We have in our petition specific dollar amounts stated, and Mr. Woosley does not specify a dollar amount. He set forth his hours and suggested a percentage approach so that would really depend upon what that ultimate common fund looks like." The court asked counsel to include that information in the same letter. That letter reflected a requested multiplier of 13 for all 3 awards.

The judgment entered three days later granted the fee applications of former and current counsel in almost the exact amounts requested; former counsel requested $ 1,707,498 and was awarded $ 1.7 million and current counsel requested $ 12,378,203.50 and was awarded $ 12 million. However, Woosley requested $ 10,368,800 and was awarded $ 1 million. Woosley attacks this award on several bases.

Woosley complains the court improperly based its fee award to him on a standard for a layman, rather than compensating him for the legal services he rendered to the class. It is important to note that the fact Woosley was not made cocounsel of record in this case does not automatically preclude him from receiving compensation for legal services; if he in fact rendered legal services to the class in connection with this case, he may be awarded fees reflecting the reasonable value of those services without being named attorney of record. (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 915, fn. 14 .) We also note that Woosley's involvement as class representative does not preclude him from recovering fees for legal services rendered to the class. (*Id.* at p. 915, fn. 13; *McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 451; see also *Renfrew v. Loysen* (1985) 175 Cal.App.3d 1105, 1108-1110.)

The record gives many indications that an award to Woosley for legal services might have been appropriate. Woosley's fee application and supporting declaration refer only to his legal work on this case. As quoted, earlier, the trial court expressly recognized that Woosley had "contributed both legally and factually" to the case; class counsel admitted Woosley's work on the case had been particularly beneficial because he is a tax specialist, and counsel for DMV expressed his awareness that Woosley had been acting as an attorney in the case.

Yet it is unclear whether the award to Woosley was to compensate him for these professional services as attorney, for services as a tax specialist, for his contributions as a classic car collector, or merely for the

inconveniences he suffered as class representative. The court's assurance to him that he would be "perfectly, totally protected" regarding the matter of compensation provides us with no insight, either, as to the specific services the court's award encompassed. The record is inadequate to permit meaningful appellate review of the court's exercise of discretion as to Woosley's entitlement to an award for legal services rendered to the class. We note the original trial judge retired shortly after the entry of judgment in this action. Therefore we remand not merely to obtain an adequate record, but for the new trial judge to independently exercise his discretion on the record as to whether Woosley is entitled to an award for his legal services.

This brings us to an additional contention in Woosley's cross-appeal, that the trial court's award to him is not supported by a record showing that it was calculated in accordance with the lodestar adjustment method required by *Serrano III, supra.*

Under *Serrano III*, determination of attorney's fees in class action and public interest litigation requires a trial court to first determine a "lodestar" figure based on a compilation of the time spent and reasonable hourly compensation, for each attorney involved in the presentation of the case. That lodestar figure may then be increased or reduced by use of a multiplier, based on a number of factors specific to the litigation. (*Serrano III, supra*, 20 Cal.3d at pp. 48-49; *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322.) Such an award must be supported by a record showing that it was calculated from a lodestar determination of time spent and reasonable hourly compensation of each attorney; an abuse of

discretion appears in the absence of such showing. (*Mandel v. Lackner* (1979) 92 Cal.App.3d 747, 758- 759, fn. 6.)

In this case, the record reveals no independent analysis of these fundamental factors. At the hearing on the fee applications, the court merely stated its intention "to grant the motions substantially in the form as requested," indicating it was satisfied with the factual support that had been submitted. The subsequent awards to former and current class counsel represented "rounded off" amounts of the requested fees; the court apparently adopted, without comment, the lodestar figures and multiplier requested by counsel. The award to Woosley reflects neither his requested lodestar and multiplier, nor any other basis for its calculation. This record is clearly inadequate.

To the extent the trial court determines on remand that Woosley is entitled to fees based on his legal services, the record must reflect the application of the lodestar adjustment method required under Serrano III for the calculation of the amount of the award. Proper analysis will require the court to first make a lodestar determination of time spent and reasonable hourly compensation for Woosley, and then to decide on an appropriate multiplier based on factors which include the novelty and difficulty of the questions involved in the case, the skill displayed in presenting them, and the fact that more than one law firm contributed in some share to the success of the litigation. (*Serrano III, supra*, 20 Cal.3d at pp. 48-49.)

Evaluation of these factors for Woosley's legal

contribution to the case may necessitate an adjustment in the valuation of other counsel's work on the case in order that the total fees awarded in the case remain reasonable in light of the *Serrano III* factors. Thus, if the court decides that Woosley should be compensated for his legal services in this case, and if it finds that valuation of all fees are interdependent, then its determination of the amount of Woosley's fees must also involve an examination and perhaps a redetermination of the fees awarded to all other counsel for the class. (*Gonzales v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 805-806.) Any redetermination must, of course, include a proper calculation on the record of the lodestar and multiplier. If the trial court, in its exercise of discretion, determines that Woosley is not entitled to attorney's fees, then the award of attorney's fees to current and former class counsel is affirmed.

Current counsel challenges the propriety of any reexamination of the attorney's fees already awarded, arguing that no appeal was taken from the award of fees to current and former counsel. The notice of appeal filed by DMV in this case was from the judgment, and the judgment included the award of attorney's fees. There is thus no jurisdictional obstacle to our consideration of the matter.

The absence of any initial appellate contentions regarding the propriety of the fees to class counsel is not unexpected, considering the relative positions of the parties. DMV had no direct interest in challenging the amount awarded, since it was a "common fund" award which would be paid out of the class recovery rather than by DMV. Class counsel certainly had no motivation to

complain, since the trial court awarded the amount of fees requested. Woosley's cross-appeal was taken on his own behalf, seeking review of the award to him for his legal services to the class; he was not acting as class representative in seeking the higher award, particularly since any increased award to him might mean additional depletion of the common fund. Given the absence of an advocate to represent the class interests on the question of the overall reasonableness of the attorney's fees, we find the issue was adequately preserved and properly presented by the DMV in its brief filed September 29, 1988, upon request of this court.

DISPOSITION

The judgment in favor of the plaintiff and the class is affirmed. The award of fees to Woosley is reversed and remanded for determination in accordance with the views expressed herein. Parties to bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

LUCAS, P.J.

I concur:

BOREN, J.

CONCURRING OPINION - Woosley v. State of California

I concur with the Presiding Justice's opinion that before 1983 the Legislature did not authorize the DMV to override the presumption of Revenue and Taxation Code section 6276, that the VLF market value constitutes the sales price for the determination of the use tax. I write separately merely to emphasize that the Legislature had that proposition before it in 1971. It passed instead a revenue enhancing measure which multiplied the presumed sales price by a factor of 1.2. It rejected the provision which would have required the Department of Motor Vehicles to impose the use tax based on actual sales cost. This fact is a strong indication of the Legislature's satisfaction with a tax structure based on a presumption of vehicle price which would be rebutted only by a taxpayer who had paid less than the presumed price. " ' "The failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended." ' " (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 956.)

Moreover, DMV internal memoranda consistently recognized that the 1965 amendment of section 6276, which converted the irrebuttable presumption into a rebuttable one, was made simply to permit registrants to show their actual purchase cost was less than the presumed price. This legislative change did not enhance the convenience of the DMV or its efficiency but rather favored registrants who had purchased vehicles below the presumed price. In fact, as DMV memoranda stated, any

DMV procedures aimed at ascertaining actual cost would place an additional burden upon the DMV. Also rebuttals by registrants result in less revenue to the state, not more, although such rebuttals were few in number.

In 1971 when the choice was placed squarely before it, the Legislature chose not to eliminate the presumption and allow actual sales price to determine the tax even though such a proposition would have increased revenue. It retained the presumption and chose instead to increase revenue by the specific and limited means of the 1.2 factor. Clearly this approach to revenue enhancement was more equitable and fair since it reached all registrants, not just a portion. Faced with these legislative decisions, I must agree with the trial court and the Presiding Justice that the DMV could not unilaterally eliminate the presumption in order to increase revenue.

BOREN, J.

DISSENTING OPINION - Woosley v. State of California

I respectfully dissent from the majority's conclusion that the Department of Motor Vehicles (DMV) in 1976 invalidly collected use taxes from buyers of motor vehicles based on their sales price. In my opinion the DMV's change in practice by which it began calculating use tax for all vehicles sold on the basis of the actual sales price to the purchaser was lawful and appropriate.

As explained in a formal Attorney General's opinion on which the DMV and the State Board of Equalization (SBE) relied in 1976, the Legislature never intended that only the vehicle buyer could rebut the rebuttable presumption of section 6276. The basic general rule for use tax is that it be based on sales price. (§ 6201.) The rebuttable presumption of section 6276 that the sales price equals the vehical license fee (VLF) value was intended to allow DMV to refer to an available figure and to collect a minimum tax when sales price could not be ascertained. The Legislature never intended to prohibit DMV from determining the actual sales price by asking for a certificate of cost (§ 10753) from the buyer who, with the seller, is the person in the best position to know the sales price of the vehicle. The 1976 change in practice was a completely proper interpretation of the laws established by the Legislature, namely that use tax is to be based upon sales price (Rev. & Tax. Code, § 6201) and that the presumption of section 6276 is a rebuttable one. In effect the majority is treating that presumption as conclusive.

The trial court placed undue emphasis on prior

internal memoranda of the DMV which suggested that the DMV thought the presumption was rebuttable only by the buyer or that legislation would be required to enable DMV to rebut the presumption. Nowhere in section 6276 does it say that only the buyer may rebut the presumption. Nowhere does it say that the DMV could not obtain evidence of the sales price from the buyer of the vehicle. The buyer has no privilege which precludes the DMV from asking the buyer to reveal the sales price. The fact that for some reason the DMV had reservations about its authority under section 6276 does not change the plain meaning of the statute. Nevertheless, uncertainties in DMV's own internal expressions were resolved by the Attorney General's opinion issued in January 1976. The Attorney General's opinion thoroughly explained the duty to collect use tax on the basis of sales price, the ability of any party including the DMV and SBE to rebut the presumption of section 6276, and the ability of the SBE and DMV to act by interagency agreement.

The trial court also misconstrued the effect of the Legislature's 1971 amendment to section 6276. The trial court found that the Legislature had before it a proposal to eliminate the rebuttable presumption and require that use taxes be based on the cost price to the purchaser, and that instead the Legislature adopted another proposal, supported by the SBE and the DMV, which left the language of the rebuttable presumption intact but multiplied the amount by a factor of 1.2. The trial court erroneously concluded that because the Legislature did not "eliminate" the presumption, the Legislature intended to prohibit the DMV from rebutting it. On the contrary, the 1971 legislation did not change the nature of the rebuttable presumption, it merely increased the tax by a

multiplier. Both prior to and after the 1971 amendment the statute did not limit which party may rebut the presumption.

Finally, the trial court's alternative theory that the increased taxes should be refunded because the agreed procedures were not adopted by formal regulation is also without merit.

Background

Section 6276 is derived from former section 6011.5 enacted in 1963. At that time section 6011.5 provided that when the purchaser of a motor vehicle was required to pay use tax to the DMV, "the sales price of the property shall be deemed to be its market value at the time of application for registration as that value is determined to measure the license fee imposed under Section 10751 of this code." (Stats. 1963, ch. 1858, § 1, p. 3834.)

When enacted as section 6276 in 1965, the section was amended to read, "[T]he sales price shall be presumed to be its market value at the time of the purchase as that value is determined to measure vehicle license fees .... The presumption may be rebutted by evidence which establishes that the sales price was other than such market value." (Stats. 1965, First Ex. Sess. ch. 2, § 14, p. 5449.)

Although there was no direct legislative history concerning the purpose of this amendment, evidence before the trial court indicated that there had been complaints by registrants who were being asked to pay

more use tax than they would have paid based on the actual purchase price. Contemporaneous internal memoranda of the DMV showed that the policy of the DMV was to use the VLF value unless the applicant submitted evidence that the sales price was less than the VLF value.

Over the years the SBE urged that much higher use taxes would be collected if the assessment were based on actual sales price instead of VLF presumed value.[1/] The DMV and the SBE had numerous meetings and conflicts over this issue. The DMV generally resisted, arguing that implementing SBE's approach would require greater administrative effort by DMV employees and would require statutory amendment by the Legislature.

In 1971 the Legislature amended section 6276. The Legislature retained the statutory presumption but modified it to provide that the presumed VLF market value be multiplied by a factor of 1.2 for noncommercial vehicles including passenger vehicles. The 1.2 factor comported with studies prepared by the state showing that if use tax were based on actual price, it would be 1.2 times the amount yielded by using the VLF value. The 1971 amendment thus made no statutory change in the manner in which the presumption could be rebutted, nor did it address the DMV's practice of treating out-of-state vehicles on a different basis than California vehicles. It

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[1/] The hundreds of millions of additional dollars collected after the DMV began using the sales price abundantly proves SBE's contention.

merely increased the tax by 20 percent.

In 1973 the SBE renewed its efforts to convince the DMV to collect use tax based on actual sales price. SBE and DMV entered an interagency agreement in December 1973 (the 1973 interagency agreement) which specified that "the Department [DMV] shall compute the use tax on a vehicle required to be registered or subject to identification measured by the sales price of the vehicle. In the absence of a bill of sale or other documented evidence of sales price, the sales price of a vehicle required to be registered, other than one purchased outside the state from the manufacturer or a vehicle dealer, is presumed to be the market value of the vehicle as that value is determined [for VLF purposes], multiplied by a factor of 1.2 .... This presumption of the sales price of the vehicle may be rebutted by evidence which establishes that the sales price was other than such amount."

The SBE and the DMV continued to have conflicts over the implementation of the 1973 interagency agreement. DMV employees tended to discourage the use of bills of sale or other evidence of cost.

The SBE requested a formal opinion of the Attorney General concerning the effect of the presumption in section 6276 and the mannerof rebutting it. The Attorney General rendered the opinion in January 1976. (59 Ops.Cal.Atty.Gen. 47 (1976).) The Attorney General reached three conclusions: "1. Revenue and Taxation Code section 6276 in no way limits which party may rebut the presumption pertaining to 'sales price,' and it therefore appears clear that either the Board of

Equalization (or the Department of Motor Vehicles, its agent) or the taxpayer may rebut the presumption by appropriate contrary evidence. [¶] 2. The Board of Equalization, as part of its administrative responsibilities, appears mandated to make a determination of the additional taxes owing, once the true larger sales price has come to its attention. [¶] 3. Exclusive reliance on the presumption contained in section 6276 of the Revenue and Taxation Code appears justified, but once evidence of the larger actual sales price comes to the attention of the Board of Equalization (or the Department of Motor Vehicles, its agent), there would be a duty to assess additional taxes."

This Attorney General opinion is highly significant because it was obviously relied upon by DMV and SBE for their interpretation of section 6276 and their authority to act by interagency agreement. For this reason I here quote substantial portions of that opinion.

In discussing the purpose and effect of the statutory presumption the Attorney General stated, "Although legislative history pertaining to section 6276 is lacking, the presumption, in our view, appears aimed at simplifying administration of the use tax laws, by allowing DMV to make reference to a readily ascertainable figure for purposes of computing the tax. The presumption would appear to also assure the collection of a minimum amount of use tax, even in situations where the actual sales price was not readily ascertainable. [¶] Such a presumption appears established to implement no particular public policy other than facilitating the determination of the 'sales price.' "

"The section specifically allows rebuttal of the presumption 'by evidence which establishes that the sales price was other than such amount.' The section in no way limits which party may rebut the presumption, nor does it suggest that the purchaser should be excused from the obligation to pay the use tax based on the actual sales price, when that figure is available. §§ 6201 and 6011. The conclusion appears clear therefore, that either the Board (or DMV, its agent) or the taxpayer may rebut the presumption by appropriate contrary evidence."[3/]

The Attorney General referred specifically to the 1973 interagency agreement and interpreted it to mean that the DMV and the SBE had "agreed that DMV has the responsibility to first seek evidence establishing the actual sales price, and only if such evidence is not available do they resort to the presumption referred to in section 6276." (Id. at p. 49, fn. 2.) The Attorney General further stated that "the Interagency Agreement might be amended to further delineate the respective responsibilities of the two agencies, within the guidelines

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[3/] "It was suggested that only the taxpayer, and not the Board had the right to rebut the presumption of the 'sales price.' Such was the statement of intent contained in Assembly Concurrent Resolution No. 115 (Murphy), introduced August 25, 1975. Inasmuch as this concurrent resolution was neither passed by the Assembly nor concurred in by the Senate, we do not pass upon such a resolution's effect on the interpretation to be given section 6276." (59 Ops.Cal.Atty.Gen. at pp. 49, 50, fn. 3, italics added.)

expressed herein."[4/] (Id. at p. 50 and fn. 4, emphasis added.)

Finally, the Attorney General concluded, "Your third question was whether the presumption in section 6276 may be relied upon in collecting use tax without any attempt to establish and collect use tax measured by the actual sales price. Section 6276 states that the sales price 'shall be presumed' to be the amount determined by application of the specified factors, absent rebutting evidence. As stated above, such a presumption is one affecting the burden of producing evidence. Following the analogy of the Evidence Code, such a presumption requires one 'to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence. ...' (Emphasis added.) Evid. Code, § 604. Exclusive reliance on the presumption therefore would appear to conform with the legislative intent in enacting section 6276 as a means of expediting the collection of the use tax. However, once evidence of the larger actual sales price comes to the attention of the Board (or DMV, its agent), there would be a duty to assess additional taxes, as discussed above in Analysis No. 2." (Id. at p. 51, emphasis added.)

[4/] "The Agreement might provide, for example, specific steps that DMV should take in an attempt to ascertain the actual 'sales price' before they are authorized to resort to the presumption established by section 6276. Other areas of potential dispute might similarly be dealt with in the Agreement."

When the 1976 interagency agreement, requiring all use taxes to be calculated on the actual cost of the vehicle, was subsequently implemented, the amount of revenue collected increased dramatically. In the year following the change, use tax revenue jumped from $ 7,840,000 per month to $ 10,640,000 per month.

Statutory Interpretation

Prior to entering the 1976 interagency agreement, SBE requested and received a formal opinion of the Attorney General construing the rebuttable presumption in section 6276. Although not binding on the courts, a formal opinion of the Attorney General is entitled to significant weight. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 30.) The Attorney General's opinion (59 Ops.Cal.Atty.Gen. 47) clearly held that nothing in the language of section 6276 limited which party may rebut the presumption. The Attorney General's opinion further concluded that the purpose of the presumption was to simplify the administration of the use tax laws by allowing the DMV to make reference to a readily ascertainable figure, as well as to assure the collection of the minimum amount of tax in situations where the actual sales price was not readily ascertainable.

I find the Attorney General's opinion persuasive. I agree with its conclusions that nothing in section 6276 prohibited DMV to choose to give up the convenience afforded by the presumption and instead to rebut the presumption by asking the taxpayer for the sales price.

Plaintiff points out that it had been long-standing policy of DMV to interpret the rebuttable presumption as

a one-way street in favor of the vehicle buyer. This could support, but in light of the clear language of the statute does not compel, the conclusion that the Legislature intended the statute to operate only in favor of the taxpayer. For many years SBE criticized DMV's interpretation. The Attorney General's opinion points out that neither the language of section 6276 nor any subsequent legislative action adopts the view that only the taxpayer may rebut the presumption.

The trial court placed much emphasis on the fact that in 1971 several bills were considered by the Legislature to change the method of calculating VLF, including a proposal to change explicitly to a cost price method. The one eventually adopted by the Legislature did not change the language of the rebuttable presumption but rather multiplied the figure by a factor of 1.2. The conclusion drawn by the trial court was that the Legislature did not want DMV to rebut the presumption and insisted that the presumption be used. It was primarily on this basis that the trial court held the 1976 change in practice was contrary to legislative intent.

I disagree. The language of the rebuttable presumption was not changed by the Legislature, but as indicated in the Attorney General's opinion, the main purpose of the rebuttable presumption appears to be the administrative convenience of the DMV. Reenacting that presumption does not show that the Legislature intended to prohibit DMV from voluntarily giving up that convenience and rebutting the presumption. Plaintiff seems to find comfort in the fact that the Attorney General's opinion stated that exclusive reliance on the presumption "appears justified" or "would appear to

conform with the legislative intent in enacting section 6276 as a means of expediting the collection of the use tax." Plaintiff misinterprets that language. The entire thrust of the Attorney General's opinion was that the presumption, which was for the administrative convenience of the DMV, may be rebutted if DMV and SBE so choose. The opinion said that reliance on the presumption was justified, not that it was mandatory.

As part of its argument that the change in practice was contrary to legislative intent, the trial court suggested that the Legislature had not authorized DMV to require a certificate of cost, and that such a certificate would amount in effect to a tax return. I disagree with these arguments. Other subdivisions of section 10753 had long authorized DMV to determine market value on the basis of cost price to the purchaser as evidenced by a certificate of cost. Having concluded, consistent with the Attorney General's opinion, that DMV was authorized to rebut the presumption of section 6276, it is my opinion that section 10753 authorized a certificate of cost. If requiring a certificate is authorized by section 10753, there is no point in straining to characterize it as a tax return. In any event section 6292, on which the court relied, provides that "[a]pplication to [the DMV] by the purchaser relieves the purchaser of the obligation to file a return with the [SBE] under Section 6452." This merely relieves the purchaser of the obligation to file a return with the SBE which would otherwise be required by

section 6452.[2/] Section 6292 does not prohibit DMV from requiring a certificate of cost.

Regulation

As an additional and apparently independent ground for its ruling in favor of the post-1976 class, the trial court held that the 1976 change in practice, pursuant to the interagency agreement, was "an invalid attempt to create a regulation." It is suggested that DMV's change in interpretation fits the definition of a "regulation" in the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and, since DMV did not follow the formal procedures of public notice and hearing for promulgation of a regulation, the new policy was "invalid."

This issue is a confusing red herring. It certainly does not support the conclusion reached by plaintiff that the increased taxes collected under the new interpretation should be refunded.

Preliminarily, no inference can reasonably be drawn of any intention to "evade" the Administrative Procedure Act. Prior to entering the agreement, SBE requested and received a formal opinion of the Attorney General, which is a published document, interpreting

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[2/] Section 6452 provides in part that "[f]or purposes of the use tax, a return shall be filed by every ... person purchasing tangible personal property, the storage, use, or other consumption of which is subject to the use tax."

section 6276. That Attorney General's opinion discussed the 1973 interagency agreement and very clearly implied that the two agencies could enter a new interagency agreement to implement the policies and interpretations supported by the opinion. Furthermore, in the press release announcing the new policy, the agencies stressed that the opinion of the Attorney General "concurred that the new collection procedure could be implemented without making any changes to the present law."

Second, absence of formal regulatory procedures did not invalidate the taxes. "Regulation" is defined in Government Code section 11342, subdivision (b) as "every rule, regulation, order, or standard of general application-... adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it ...." Assuming that the 1976 change in interpretation fits this definition, what is the effect of DMV's failure to use the formal regulatory procedure? Plaintiff assumes that the increased tax collected as a result of the change was therefore illegal and should be refunded. This conclusion does not follow.

In performing its functions, an administrative agency has many occasions to interpret the laws in its area of expertise, and its interpretations can take a wide variety of forms, ranging from formal regulations to less formal policies, guidelines, manuals, public statements, decisions, positions taken and the like. When the agency has not expressed its policy by formal regulation and the agency's interpretation is litigated, the court does not owe it the special deference which is accorded to a formal regulation within the agency's rulemaking power. In such situations the court interprets the law for itself and is

entitled to discount or disregard an agency interpretation which has not been adopted by formal regulation. (*Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 92-93; *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal.3d 60, 65; *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205.) The ultimate question is still the validity of the agency's interpretation of the substantive law. (*Culligan Water Conditioning v. State Bd. of Equalization, supra*, 17 Cal.3d at p. 93; *Armistead v. State Personnel Board, supra*, 22 Cal.3d at pp. 204-206; *Associated Cal. Loggers, Inc. v. Kinder* (1978) 79 Cal.App.3d 34, 42-43; *Carden v. Board of Registration for Professional Engineers* (1985) 174 Cal.App.3d 736, 744.) The agency's interpretation is not automatically wrong merely because it could have been, but was not, expressed in a formal regulation.[3/]

Since DMV's change in practice was not inconsistent with the rebuttable presumption in section 6276, the fact that the change was not effected by a formal regulation does not independently render the taxes illegal.

ASHBY, J.

[3/] *California Assn. of Nursing Homes etc., Inc. v. Williams* (1970) 4 Cal.App.3d 800 [84 Cal.Rptr. 590] and *California Optometric Assn. v. Lackner*(1976) 60 Cal.App.3d 500 [131 Cal.Rptr. 744], cited by plaintiff, are not to the contrary. Those cases involved ratemaking proceedings in which the administrator was required by other provision of law to fix the rates by means of formal regulation.

APPENDIX D
ENTERED December 27, 1983

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CHARLES PATRICK WOOSLEY, individually and on behalf of all others similarly situated Plaintiffs, vs. STATE OF CALIFORNIA, et al. Defendants.	No. CA 000499 STATEMENT OF DECISION

INTRODUCTION

This is the first part of a bifurcated class action in which the Court is called upon to determine issues of liability only, relating to license fees and use taxes collected by the State of California on vehicles. The issues relating to class certification and class damages are reserved for second-stage proceedings, all in accordance with the stipulation of the parties and the prior order of the Court. See, Stipulation and Order filed herein on October 5, 1978.

The matter was tried to the Court on September 20, 1982. Thereafter extensive briefing was submitted by plaintiffs and defendants.

The issues to be determined by the Court are essentially legal issues. Many facts have been admitted or stipulated to by defendants, and defendants did not challenge factually

the additional voluminous evidence that plaintiff produced at trial. No objection was made to plaintiffs' evidence. Much, if not virtually all, of the proof, whether stipulated or otherwise, comes from defendants. Counsel for the parties have agreed that all documents presented to the Court by the plaintiffs are admitted into evidence without objection. (The stipulated facts are referred to as "Stipulated Facts, No._.") For clarity in presentation, "vehicle" means passenger motor vehicle except as indicated otherwise.

In this discussion a "resident vehicle" is a vehicle which was originally sold new in California. A "nonresident vehicle" is one which was sold outside of California. All section references are to the Revenue and Taxation Code, unless otherwise noted.

THE PARTIES

1. Plaintiff CHARLES PATRICK WOOSLEY ("Woosley") is, and at all times pertinent to the within lawsuit was, a resident of the County of Los Angeles, State of California. He brings this action for himself and on behalf of all similarly situated persons.

2. The State of California, the Department of Motor Vehicles ("DMV"), the Board of Equalization ("SBE") and the Board of Control ("BOC") are all defendants. The DMV is the entity which collects the vehicle license fees and use taxes which are the subject of this lawsuit. The SBE is the entity for which DMV acts as agent in collecting use taxes upon the registration of motor vehicles. The BOC is a defendant because it is the entity charged approving refunds of license fees.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

3. Appropriate administrative claims were made by plaintiff individually and as class representative and were denied outright or deemed denied by operation of law for failure of the defendants to respond. Section 6934.

4. There is no dispute that all VLF remedies were exhausted, and no dispute that Woosley's individual use tax remedies were exhausted. Stipulated Fact No.15; A.G. p.4 ll. 14-25. The only administrative exhaustion issue raised by defendants is the exhaustion of the class use tax remedies. There are several reasons why defendants' position is unsound.

5. First, the claim was denied by the SBE outright.

(a) Having paid part of the use tax demanded by the DMV on the vehicle he brought into California, Woosley filed a claim with the SBE on October 20, 1977, both for himself and on behalf of the class. Payment of all of a use tax is not required in order to sue for a refund. *Schaeffer v. SBE* (1952) 109 Cal.2d 46; *Snoozie Shavings, Inc. v. SBE* (1979) 97 Cal.App.3d 848.

(b) The claim was amended March 7, 1978 to reflect the fact that Woosley has paid the remainder of the use tax in the interim. See, Exhibit 1. On June 7, 1978, the SBE issued a notice that the claim had been denied. See, Exhibit 1.

(c) Second, the SBE's position is that Woosley did not present a class claim. This is based on a strained interpretation of the thrust of a letter written May 3, 1978 to plaintiff Woosley by W.E. Burkett, tax counsel to the SBE and is in error. The key portion of the letter states:

> Our records do not provide the means for identifying the persons who are so similarly situated and for whom you seek a refund as a class. If you have the means of identifying each person similarly situated, *we will be pleased to provide them with a ruling relative to the merits of their claim. If the underlying facts are the same as your claim, it would be our conclusion that no refund is due.*" (Emphasis added.) Exhibit 1

The SBE's position is erroneous.

(a) First, Mr. Burkett's statement that the State's records do not provide the means for identifying the members of the class is disingenuous and erroneous.

(i) The State's computer stored records provide the means for very ready identification and easy notification and reimbursement of class members.

(ii) Further, the thrust of the Burkett letter relates to *notifying* class members of the *denial* of the claim, not to any reservation of the issue.

(iii) Woosley's claim is clearly and expressly stated both in an individual and in a representative capacity. That claim was specifically denied.

(b)The claim was deemed denied by operation of law. A claimant may consider a claim for refund denied six months after its filing. R&TC 6934. *Honeywell v. SBE* (1975) 48 Cal.App.3d 897. The claim was filed on October 20, 1977. Six months from that date is April 20, 1978. Suit was filed June 20, 1978, after the statutory six month period expired.

7. Third, the SBE is estopped to deny denial of the class claim.

(a) The "Notice" (Exhibit 1) did not put the representative plaintiff on notice that the SBE was purporting not to rule on the class portion of the claim. This theory was not specifically raised in Defendants' Answer, on file herein, and appears to be an afterthought. According even to authorities cited by defendants, it is now too late to raise this issue. See, *King v. SBE* (1972) 22 Cal.App.3d 1006.

(b) The purpose of the rule of exhaustion of administrative remedies is to lighten the burden of the courts in cases where administrative remedies are available. Cal.Jur. 3d, *Administrative Law*, Section 263. There is no

indication that it is a rule promulgated to trick citizens. To the contrary, substantial compliance with a claim statute is sufficient. *San Jose v. Superior Court* (1974) 12 Cal.3d 447. In each of the cases cited by the defendants, the taxpayer had no reasonable argument that he had complied with the claims procedure. Here, the State's argument is that what appeared to be a denial the claim for the whole class was in fact only a denial of the representative plaintiff's claim. This is an especially weak argument in that the statute clearly allows the filing of an action after six months has elapsed after a claim is filed.

(d) The California Supreme Court has stated precisely what is required of a class claim made by a representative plaintiff. In *San Jose v. Superior Court*, supra, the city argued that its claims procedures required an individual claim from each plaintiff so as to rule on each and every claim of the class members. The Supreme Court rejected these arguments, holding that to demand an individual claim from each member in advance of the complaint would thwart class action relief:

Thus, to satisfy the claims statutes, the class claim must provide the name, address, and other specified information concerning the *representative* plaintiff and then sufficient information to identify and make ascertainable the class itself." 12 Cal.3d 447, 457.

(e) Inasmuch as Woosley has, by his claim, complied by providing all information concerning himself and has provided sufficient information to identify and make the class ascertainable, the SBE has been given proper notice, regardless of any regulation to the contrary.[1]

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1. The purported regulation relied upon by defendants went into effect on June 22, 1978, after plaintiffs' claim had long been filed. Even if some argument could be made that *ex post facto* regulations apply to

(f) Any contrary assertion by the SBE is inconsistent with the purpose of the claims procedure, which is "to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." See, *San Jose v. Superior Court, supra*, at p.456.

8. All administrative remedies were properly exhausted by plaintiff individually and on behalf of the class. The Court has jurisdiction to determine all of plaintiffs' claims.

THE NATURE OF THE CASE

9. Plaintiffs challenge the practice of the DMV and SBE of imposing taxes on vehicles originally sold outside California higher than those charged on like vehicles originally purchased within California. Plaintiffs contend and this Court concludes that the practice is discriminatory and not only violative of applicable state statutes and regulations, but also of the Commerce Clause and Equal Protection Clause of the constitutions of the United States and of California.[2]

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prior claims, *San Jose v. Superior Court, supra*, standards have been fully complied wit by plaintiffs.

2. The discriminatory practice relating to use taxes changed in November 1976. Thereafter, purchasers of both resident and nonresident vehicles have been treated the same for purposes of use tax collection. However, the November 1976 change in practice was improper because the State did not amend the statute and did not follow the requirements of the Administrative Procedures Act. Whereas prior to November 1976 nonresident vehicles were taxed in violation of law, since November 1976 *all* vehicles have been illegally assessed use taxes. The discriminatory practice, as it relates to license fee assessment, did not change in 1976, and continues to the present time.

10. Plaintiff Woosley, a resident of California, purchased a used automobile in North Carolina and registered it in California. That vehicle was not originally sold in California. If Woosley's vehicle had been originally sold in California, he would have paid a license fee of $2.00 and use tax of $6.00. Because, and only because, the vehicle was purchased outside of California, and brought here in interstate commerce paid a license fee of $427.00 and use tax of $1,500.00.

11. From 1967 through the present, motor vehicles originally sold new in other states and brought into California were are valued on a different and significantly higher basis than similar motor vehicles purchased in California that were previously licensed, registered or titled in California.

12. The applicable statutes do not require or suggest this result.

13. As a result, significantly higher vehicle license fees were and are charged on out-of-state vehicles than on comparable resident vehicles.

14. Because of the calculation of use taxes based upon the vehicle license fee values, until November 15, 1976 the same result occurred as to use taxes, with out-of-state vehicles paying significantly more than their counterpart California vehicles.

15. The unequal use tax treatment was changed in November 1976.

16. However, the recognition and correction of the inequality did not result in out-of-state vehicles being treated like California vehicles, with a reduction of use taxes. Rather, the converse occurred and now all vehicles are charged higher use taxes, even though the statutory provisions remain the same.

VEHICLE LICENSE FEES THE VLF STATUTE DOES NOT REQUIRE THE USE OF A COST PRICE RATHER THAN A BASE PRICE FOR OUT-OF-STATE AUTOMOBILES.

17. California imposes a vehicle license fee ("VLF") in addition to the registration fee on motor vehicles. See Exhibit 2.

18. Registration on all vehicles was $11 per year until 1982, when it was raised to $22. Veh.C. §9250. The license fee is assessed on an approximation of the value of the vehicle and is *in lieu* of personal property taxes. Section 10758.

19. The vehicle license fee is calculated by determining a "starting price" of the vehicle, assigning the "starting price" to a schedule of price "classes," determining the "midpoint" of the class, determining where on a statutory nine-year depreciation schedule the vehicle belongs, and then multiplying 2% times the depreciated "starting price."

20. The first step in computing the license fee is to determine the "starting price" and assign it to a Vehicle License Fee Class ("VLF Class"). On vehicles first registered or titled in California before the Fall of 1967, the "starting price" was called "delivered price" and was originally determined from agreements between manufacturers and dealers and later from prices suggested by manufacturers obtained by correspondence. Section 10753(a), before amendment by Stats. 1967 ch. 435 § 2.

21. Prior to 1968 the DMV compiled, published and maintained a looseleaf Vehicle License Fee Rate Book ("Rate Book") in which the VLF classes were shown. Stipulated Facts, No.24(d). The classes are a schedule of monetary value classifications from $0 on up. Except for the first and second class ($0-49.99, and $50-199.99), each class is $200 wide and ends with -99.99. Section

10753.2(b). Each class is assigned a two letter code starting with AA, AB, etc. Thus, as an example, BA is the 23rd class, and would cover $4,200-4,399.99.[3]

22. The VLF classes for virtually all makes, models and years of vehicles built before the 1968 model year were shown in the Rate Book. Stipulated Facts, No.25(d).

23. All like vehicles, whether California or nonresident, were treated the same in the Rate Book. Stipulated Facts, No.25(g).

24. Accordingly, there was no discrimination between resident and nonresident vehicles prior to 1967. See Exhibit 3, Rate Book Sec. 1.0100, 2.0050, & 6.0050.[4]

25. The State candidly admits that prior to the amendment of 10753 in 1967 to refer to the "federal sticker," "the department did not differentiate between California vehicles and nonresident vehicles for purposes of assessing vehicle license fees." (Defendants' Post Trial Brief, hereinafter "A.G.", p. 5; R.T. p.17 l. 21 to p. 18 l. 22.)[5]

26. When the system was established in 1949 it was common for Vehicles to sell for more than the market value established by the statute. A.G. p.8, 57.

27. In the early 1960's the DMV lobbied for a change in the method for determining VLF, arguing to the Legis-

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3. Once assigned to a vehicle, the VLF class is rarely changed. Those rare exceptions are not relevant to this case. See Stipulated Facts, No. 27.

4. An exemplar of the Rate Book was shown to the Court at the trial. Because of its bulk, and because only very limited portions were necessary to demonstrate plaintiffs' claim, the exemplar was not offered into evidence. Rather, selected excerpts from the Rate Book were offered and accepted.

5. The trial transcript is referred to as "R.T. p. __ l. __."

lature the manufacturers objected to giving prices and that delays occurred at the beginning of each model year. The DMV proposed that the VLF be based on cost. See, particularly, Exhibit 4. See, also, Exhibits 5 through 37.

28. The legislature rejected the DMV proposal to base VLF on cost and instead amended 10753 in 1967. Section 10753, as amended, changed the term "delivered price" to "suggested Base Price," and directed the DMV to refer to the "sticker price."

29. The suggested base price "is defined in the law as the retail price of the vehicle suggested by the manufacturer, plus destination and smog control *as shown on the price listing on the vehicle under the Federal Automobile Information Disclosure Act of 1958...*" See, Exhibit 36. This so-called "sticker price" was required to be affixed to automobiles by federal law beginning in 1958. 15 U.S.C. §§ 1231-1235.

30. With the amendment to R&TC § 10753 in 1967, the DMV began determining the "starting price" for purposes of determining VLF from the federal price stickers for vehicles first sold in California. R&TC § 10753(a) and (h).

31. The only pertinent language change in the statute was to change California "delivered price", because the DMV objected to the task of obtaining price information from manufacturers, to California "suggested base price", because this number was required by federal law and was readily obtainable from any dealer. See, Exhibit 43.

32. After lobbying unsuccessfully for a change in the law to cost basis, after 10753 was amended in 1967 the DMV administratively took the position that a vehicle which was not originally sold in California (unless titled or registered in California prior to the amendment) has no "California base price." See Stipulated Facts, Nos.25, 28.

33. Jack Cary of DMV testified at trial that after the 1967 change, the Department of Motor Vehicles had a California suggested base price. (R.T., p.27, ll. 19-24.) See, also, Stipulated Facts, Nos.25, 28. Purchasers of nonresident vehicles were required to pay vehicle license fees based on actual price rather than depreciated manufacturer's suggested base price. (R.T., p.25, ll. 6-15.)

34. For these "nonresident" vehicles, the DMV uses the cost price to the first person who registers the vehicle in California to determine the VLF class. Stipulated Facts, Nos. 29, 30; Exhibits 36, 38, 39, and 40.

35. The DMV took this position, notwithstanding the fact that prior to 1967 the DMV had no difficulty in determining VLF for both resident and nonresident vehicles, without using two different methods and without discriminating against nonresident vehicles.

36. Despite the fact that defendant DMV had the means (through a "Rate Book") and has the means (through federally required pricing information and its computer facilities) to use the same basis for computing vehicle license fees ("VLF") for "resident" and "nonresident" vehicles, it has chosen to apply statutory provisions in a fashion so as to compute higher bases for "nonresident" vehicles, resulting in a significant detriment and cost to registrants of nonresident vehicles.

37. The DMV position is further shown in Exhibit 41, an Informational Memorandum from Elmer Brown, DMV Registrar, to "All Holders of the Manual of Registration Procedures." The subject of the Memorandum is "Determining VLF Classification - Non-Resident Applications." In this Memorandum, Registrar Brown states the DMV's *interpretation* of R&TC § 10753:

> "Revenue and Taxation Code Section 10753 *requires* the department to determine the market value

of a passenger vehicle upon the basis of the California suggested base price as established by the manufacturer. These are vehicles sold by California dealer. *On all other vehicles (including non-resident)*, the department shall determine the market value of the vehicle *on the basis of the cost price to the purchaser.*" (Emphasis added)

38. Non-resident vehicles are treated differently by the DMV even when the vehicle was listed in the DMV Rate Book and even when the federal sticker price information was available. See Exhibit 42, Manual of Registration Procedures ("Manual"), Section 35.010(2) b., and Exhibit 1, DMV (cARY) letter to plaintiff Woosley, dated January 19, 1977.

39. Thus, after the Legislature *rejected* the DMV's proposal to amend 10753 to provide that "market value" for purposes of VLF be determined on the basis of "cost," the DMV *interpreted* 10753 in such a way as to at least partially achieve its preferred position.

40. The DMV did this by taking the position that vehicles purchased out-of-state did not have a *California* "suggested base price." See, in particular, Exhibit 39, p.2.

41. The infirmity of the DMV's position is demonstrated in a legal opinion prepared by the DMV's legal office. The opinion, Exhibit 43, was written as a result of the fact that the effective date of 10753, as amended, was after the beginning of the 1968 model year. The question presented for opinion was whether the DMV could begin operating under the terms of 10753 prior to its effective date, or instead had to continue the past practice of obtaining price information from manufacturers. The legal opinion issued by the DMV *admits* the ease with which federal sticker price information, the basis for "California Sug-

gested Base Price", could be obtained. The opinion states, at p.5:

> "It would appear to be a useless act at this late date to attempt to obtain information as to selling prices or California delivered prices of vehicles from manufacturers *when such information is already required by Federal law to be posted on the vehicle, and can be obtained directly from any 'authorized dealer.'*"

42. The DMV has long recognized that there was discrimination against the purchase of out-of-state vehicles. As early as 1962 the DMV was aware that assessing fees based on "cost" rather than manufacturer's "suggested price" results in "significantly higher revenues." See Exhibit 5, "Cash Price Assessment of Vehicles," p.7.

43. After putting into effect in 1967 the practice of assessing vehicle license fees on out-of-state vehicles based upon "cost," while assessing resident vehicles based upon the federal sticker (which is referred to in defendants' documents as the "Rate Book Method"), the DMV commissioned a detailed study to determine the impact of its practice. See, Exhibits 44-54.

44. Prior to commissioning the study, the DMV was already aware that its practice resulted in inequities. In a letter to complaining citizen dated April 9, 1968, Exhibit 55, DMV Director Verne Orr stated:

> "There is no argument at all that an inequity can and sometimes does exist. A similar inequity occasionally arises when passenger cars purchased out-of-state are assessed at their sales price whereas identical models sold within the state are assessed at base sticker price plus transportation and smog device."

45. The DMV study was completed in 1969. See Exhibit 54. The study, Exhibit 56, is titled "Study of Vehicle License Fees." One of the specific questions addressed by

the study was whether significantly larger license fees were charged on out-of-state vehicles than on vehicles purchased in state.

The DMV study concluded:

> "The total group of non-resident vehicles (out-of-state and foreign-purchased passenger and light commercials) are assessed *significantly more* fees by the cost (amended) method than the RATE BOOK method."
>
> "The total group of non-resident vehicles within model year groups 1925, 49, 1950-55, 1956-59, 1960-64, and 1965-67, are assessed *significantly more* fees by the cost method than the RATE BOOK method."
>
> * * *
>
> "*Significantly more* fees are assessed by the cost method than the RATE BOOK method for passenger vehicles purchased out-of-state."
>
> * * *
>
> "The results of the study show that overall, non-resident passenger and light commercial vehicles are assessed *significantly more* fees by the cost method than the RATE BOOK method of assessment." (Emphasis added) Exhibit 56, pp.3-4.

46. In its June 13, 1969 report on the findings of this Study to the Director of the DMV, the DMV Staff Services Office concluded:

> "In summation, although the report simply revalidates some earlier assumptions and the weaknesses of uncontrolled sampling, it nonetheless emphatically underlines *the gross inequities* of a dual tax system, "base price" and "cost price," in assessing like vehicles differently, *depending on the place of*

purchase. Moreover, it should be noted that *these differences continue through the assessed life of the vehicle affecting all subsequent owners without regard to the location of the vehicle at the time of purchase*" (Emphasis added). Exhibit 57.

47. The "Report on Vehicle Licensing and Titling Revenues" by the Joint Legislative Audit Committee in December, 1970, Exhibit 58, recommend legislative changes to "eliminate tax inequities among vehicle owners." The Report urged the Legislature to amend R&TC § 10753 to provide that market value for license fee and use tax assessment be determined on the basis of cost rather than the rate book method. Significantly, notwithstanding the dramatic findings of its "Study on Vehicle License Fees," the legislative report makes no mention of the fact that the admitted "inequities" of the present system were being borne by purchasers of nonresident vehicles.

48. In a letter to Senator Walter W. Stiern dated May 7, 1971, Exhibit 59, DMV Director Cozens said:

> "One inequity of the present method is in determining the vehicle license fee of a vehicle purchased in another state because the market value of these vehicles is determined by the cost price to the purchaser."

49. DMV Director Cozens made the same admission in a letter dated May 27, 1971 to Vincent Thomas, Chairman of the Joint Legislative Audit Committee. Exhibit 60.

50. The disparity in license fee collections is further demonstrated in certain statistical runs prepared by the DMV in the regular course of business. These so-called "stat runs" are computerized statistical analyses of DMV license fee collections. The "stat runs," collectively marked as Exhibit 61, show the following disparities between Cali-

fornia and non-resident vehicle license fee collections from 1974 through 1979.

Period	No. of Vehicles	Total License Fee	Veh. Avg. Per Veh.	VLF Disparity
Nonres. 1/1/74	219,642	$ 4,649,313	$21.17	22.27%
Cal. 12/31/74	12,457,984	$215,014,319	$17.26	
Nonres. 1/75 -	230,300	$ 4,984,990	$21.65	26.9%
Cal. 12/31/75	12,760,128	$217,743,756	$17.06	
Non-res. 7/1/76 -	108,740	$ 3,897,775	$35.84	79.9%
Cal. 12/31/76	4,786,447	$ 95,338,114	$19.92	
Non-res. 1/1/77 -	266,189	$ 9,992,572	$37.54	82.3%
Cal. 12/31/77	10,494,484	$216,075,674	$20.59	
Non-res. 1/1/78 -	278,269	$ 12,012,161	$43.17	82.4%
Cal. 12/31/78	10,856,546	$252,838,426	$23.29	
Non-res. 1/1/79 -	264,740	$ 13,072,820	$49.38	87.4%
Cal. 12/31/79	11,220,290	$295,689,673	$26.35	

51. Notwithstanding the long recognized inequities, the DMV to the present time still assesses license fees on non-resident vehicles based on cost and on California vehicles based on the rate book method. See, Exhibit 87.

52. DMV acknowledges that the rationale for changing from the "Rate Book Method" of determining vehicle license fees (and thus use taxes as discussed hereinafter) to the "cost" method was administrative convenience. (A.G. pp.9, 17).

53. Defendants characterize the effort required to obtain manufacturer pricing information as a "significant effort." The testimony of Mr. Cary of the DMV, both in response to questions posed by plaintiffs' counsel as well as

by the Court, demonstrated that the "significant effort" involved simply writing to manufacturers requesting the information and then annually adding new pages to the DMV's Rate Book to reflect the new information. R.T. p. 22 l. 11 to p.23 l. 23.

54. The State has admitted that the unequal treatment resulting from basing VLF on the chart method for California vehicles and the cost method for non-resident vehicles results in a competitive advantage to California vehicles. See, Exhibit 90, in particular attachment captioned "Purposes for Imposing a Use Tax."

55. The defendants assert, referring to Exhibit 40 (at A.G. pp.17-18), that the DMV believed that the change that resulted in doing away with the Rate Book would "provide more efficient service to the California motorists." In fact, the "more efficient service" referred to by the DMV in Exhibit 40 is not service to California's motorists, but rather to "Dealers, Banks and Finance Companies," as shown on the very face of that exhibit. Exhibit 40.

56. The defendants admit the legislature has consistently rejected proposals to amend R&TC § 10753 to provide for assessment of license fees based upon cost. (A.G. p. 11).

57. The legislature's refusal was based in part upon the opposition of California automobile dealers. (A.G. p. 11).

58. In response to that dealer opposition, the legislature amended section 10752 to provide for assessment based upon the suggested selling price reflected in the federal sticker, rather than cost (A.G. p. 11).

59. After the amendment the DMV, which had always urged that assessment be made on the basis of cost, *interpreted* the language of 10753 as amended to require assessment of used non-resident vehicles based upon cost. (A.G. p.14)

60. Discrimination against vehicles which were originally purchased outside of California is not required by 10753 when determining the "suggested base price" of a vehicle for license fee purposes.

61. The discrimination results solely from the interpretation by the DMV of the 1967 change in the statutory language of 10753, which replaced "California delivered price" with "California Suggested Base Price." Stipulated Facts, No.28.

62. The change in statutory language was designed in part to make it easier for the DMV to determine the "value" for VLF and use tax collection. Nowhere in the history of the DMV's efforts to effect the 1967 amendment to 10753 is there any indication of a legislative purpose to treat nonresident vehicles differently than California vehicles.

63. R&TC § 10753(a) provides that market value of a passenger motor vehicle "... shall be determined by the department [of Motor Vehicles] upon the basis of the California suggested base price as herein defined and as established by the manufacturers." Subsection (h) provides that "... 'suggested by the manufacturer, plus destination charge and emission control devices ... as *reflected on the price listing affixed to the vehicle pursuant to the Federal Automobile Information Disclosure Act of 1958*, but does not include...[manufacturer installed options or accessories]." (Emphasis added.)

64. Registrants of resident vehicles thus further benefit when the bases for their vehicles are computed because manufacturer installed options are excluded, whereas these options are included in calculating the bases for nonresident vehicles.

65. The statute does not say that nonresident vehicles are to be treated differently than California vehicles. Disparate treatment occurs because of the DMV interpretation

that a vehicle originally sold to a consumer outside of California does not have a "base price" simply because of the use of the word "California" in R&TC § 10753(a).

66. It is fundamental that statutes will be construed and applied so as to be constitutional. See, *Welton v. Los Angeles* (1976) 18 Cal.3d 497, and *Palermo v. Stockton Theatres* (1944) 32 Cal.2d 53, 60. There are several reasonable explanations for the presence of the word "California" in 10753(a) that support a constitutionally valid application of the statute:

(a) It may be that the word "California" carried over from the prior wording of 10753(a), which read "... California delivered price..." Significantly, however, under the former wording out-of-state vehicles were treated the same as California vehicles, notwithstanding the presence of the modifying word "California" in earlier versions of 10753. See, Rate Book Sections 1.0100, 2.0050, and 6.0050, Exhibit 3; Stipulated Facts, No.24(g).

(b) "California" may have been left in the statute to alert the public that the expression "suggested base price" has a special meaning in this statute, e.g., suggested base price as defined *by California*.

67. The legal presumption is that, in the enactment of 10753, the California legislature did not intend to discriminate against interstate commerce.

68. Accordingly, there is no reason to interpret, as the DMV does, that the statute forecloses the use of the suggested base price, simply because the vehicle was not originally sold in California.

69. If there is a "California suggested base price" available and applicable to the license fee determination for, as an example, a 1975 Ford sold in Sacramento in 1980 to a Sacramento resident, and if the California suggested base price information is readily obtainable "from

any dealer" (see, Exhibit 43), the DMV cannot close its eyes to this information when licensing the identical vehicle for the same Sacramento resident if he happens to buy the vehicle in, for instance, Reno, Nevada.

70. At the time of the change, the DMV treated the terms "selling price" and "California delivered price" as synonymous.

71. This illustrated by a memorandum dated September 11, 1967, from Rauschert to McLaughlin, Exhibit 43, which states:

> "It would appear to be a useless act at this late date to attempt to obtain information as to selling prices or California delivered prices from manufacturers when such information is already required to be posted on the vehicle..."

72. If the legislature had intended to change the method of assessing license fees on vehicles originally sold out-of-state, the DMV should have reclassified all ex-non-resident vehicles that were registered in California as of 1967, because none of these vehicles had "California suggested base prices" either.

73. The fact that the DMV did not reassign VLF classifications to vehicles then titled or registered in California before November 1967, but which had been originally sold outside of the state, supports the conclusion that the legislature did not intend to discriminate against vehicles originally sold out-of-state and did not intend, by the use of the term "California suggested base price," to create a specially protected class of vehicles.

74. Federal sticker prices were not required until 1958, so vehicles sold before that date had and have no "sticker price." The DMV did not reassign VLF classifications to any pre-1958 vehicles as a result of the 1967 amendment. Stipulated Facts, No.26. This further indi-

cates that DMV treated "California delivered price" and "California suggested base price" as being synonymous.

75. From 1960 through 1967 the DMV had spent considerable time studying the possibility of switching to, and attempting to convince the legislature to allow the DMV to switch to a cost basis for computing VLF.

76. The legislature rejected the DMV's proposals and instead solved the DMV's major complaint about the old terminology by instructing the DMV to refer to Federal price information.

77. Defendants argue that a VLF system for passenger vehicles based on actual cost would be fair.

78. Such an argument, while interesting, is irrelevant because the evidence is clear that the Legislature consistently refused to change to a cost basis. Effective October 1, 1983 the legislature mandated that vehicle license fees be assessed on the basis of actual cost price to the purchaser.

79. Defendants argue that the 1967 amendment to 10753 changes from a system of classification of automobiles by make, model and year to a system of treating each vehicle separately or "discriminately."

80. DMV's interpretation is not supported by any evidence in the record.

81. In fact, the new system is not actually "discriminate." Manufacturers still set suggested prices for makes, models and years, as before. (R.T. p.24 ll. 8-18.) These prices are advertised and published various places and have significance independent of the VLF system.

82. The 1967 legislation was not intended to create "discriminate" or "individual" vehicle classes, as shown by the contemporaneous administrative decision not to reclassify pre-1968 vehicles already registered in California, i.e., those "classes" were not "individualized."

83. The treatment of options does not require non-California vehicles to be treated differently.

84. The base price is unaffected by factory options (R&TC 10753(h)) and is not properly affected by dealer installed options.

85. The DMV is wrong in including dealer added accessories in suggested base price. Vehicles do not have different VLF classifications depending upon subsequently added equipment.

86. Section 10753(a) provides "... suggested base price as herein defined and as established *by the manufacturers.*"

87. Section 10753(h) provides, "as used in this section 'suggested base price' means the retail price of the vehicle suggested *by the manufacturer ... but does not include* the retail delivered price suggested by the manufacturer of each accessory or item of optional equipment physically attached to such vehicle at the time of its delivery to such dealer..." (Emphasis added.)

88. There is no apparent way that a manufacturer can suggest a price that includes accessaries added by anybody else, such as the dealer. Since added accessories are by very definition not part of a price suggested by the automobile manufacturer, the statute did not need to exclude them.

89. That VLF is not meant to be determined on the precise individual characteristics of a vehicle is further shown by the fact that suggested prices are put into $200 bands; the mid-point of the band is depreciated on a statutory schedule in which all percentages end in either "0" or "5." Depreciation histories of various makes are ignored, as is the condition of the particular vehicle. See, R&TC § 10753.2.

90. There is no basis for defendants' position that out-of-state vehicles could not have a "California suggested base price."

91. The legislature did not change the meaning of delivered price/suggested based price, it simply changed the source of information for that figure.

92. The statute clearly indicates that the price in question is established by manufacturers.

93. The "... as reflected on the price listing ..." merely indicates the preferred source of the information.

94. By improperly interpreting the term "California suggested base price" the State had discriminatorily taxed nonresident vehicles since 1967.

95. If the DMV's interpretation of 10753 as amended is wrong (as the Court hold), then the DMV's practice violates (1) the stature, (2) the Commerce Clause, and (3) the Equal Protection Clause. If, however, the DMV's interpretation of 10753 were correct, then the statute itself would violate (1) the Commerce Clause and (2) the Equal Protection Clause. This is true because if the DMV's interpretation were correct -- i.e., that the use of the federal sticker as the indicia for determining VLF requires disparate treatment of nonresident and resident vehicles -- then the statute on its face would *require* the imposition of different taxes on like vehicles solely as a consequence of their state of origin.

THE STATUTE DOES NOT REQUIRE THE DMV TO DISCRIMINATE AGAINST OUT-OF-STATE VEHICLES IN APPLYING THE DEPRECIATION SCHEDULE.

96. Beginning in 1967, the DMV began discriminating against nonresident vehicles in an additional way, relating

to the manner in which the statutory depreciation schedule was applied to nonresident vehicles.

97. In the vehicle licensing process, after the DMV determines the "starting price" and assigns it to a class the DMV then determines where the class mid-point belongs on the non-year depreciation schedule, starting with the year the vehicle was first soid to a consumer a new vehicle. R&TC § 10753.2(c), before amendment by Stats. 1977 ch. 821 section 1.

98. Market value for determining VLF is determined by the depreciation schedule by depreciating the class mid-point as follows: the VLF class is depreciated by multiplying the mid-point by the following rates -- 1st year 85%, 2nd year 70%, 3rd year 55%, 4th year 40%, 5th year 30%, 6th year 25%, 7th year 15%, 8th year 10%, and for the 9th and subsequent years 5%. R&TC 10753.2(c). The Vehicle License Fee is 2% of the market value. R&TC 10752.

99. Resident vehicles commence the depreciation schedule with the year first sold to a consumer as a new vehicle, Section 10753.2

100. However, beginning in 1967, for out-of-state vehicles the DMV commenced the none year schedule of depreciation with the date of sale to the first person to register the vehicle in California, even if that person were not the original owner.[6] Stipulated Facts, No. 38. For example, for a 1961 nonresident vehicle purchased by an applicant in 1967 and registered in California in 1970 the depreciation

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6. Effective January 1, 1978, the statute authorized the depreciation schedule to begin *either* with the year the vehicle was first sold to a consumer as a new vehicle *or* the year the vehicle was first purchased or assembled by the person applying for original registration in California. Stats 1977 ch. 821 sect. 1. Stipulated Facts, No. 37.

schedule would start with 1967. See Exhibit 42, Manual, Sect. 35.120 example 2.

101. The procedure for nonresident vehicles of commencing the nine year depreciation schedule with the purchase date of the first person to register the vehicle in California, rather than the date of purchase by the original owner, discriminates against out of state vehicles. See Stipulated Facts, Nos. 39, 40. Resident vehicles are not treated this way.

102. The discrimination is clearly shown by an example of the VLF determination for vehicles, identical except for their place of origin. Assume that both vehicles are alike, and sold for the same price. One was originally sold and registered in California and the other was not. Assume both had a suggested base price of $4,250, both were originally sold to a consumer on January 1, 1970, and both have a fair market value on January 1, 1973 of $2,495. Both vehicles are bought for that price and registered in California by their new owner on January 1, 1973. Using the DMV's interpretation and practice, the 1973 license fees for these two vehicle would be calculated as follows:

California Vehicle: The California vehicle would have a VLF classification of 70 BA, *based upon its 1970 $4,250 suggested price*. $4,300 would be the vehicle's "midpoint" and the vehicle would, in 1973, be starting its fourth year on the nine year depreciation schedule, with a *40% level* on the depreciated value table. The license fee would be $4,300 x 40% x 2% = $34.40 which rounds to $34. (Rounding is required by R&TC 10759.)

Nonresident vehicle: The nonresident vehicle would be assigned a VLF classification of 73 AQ, *based upon the cost price of $2,495, in 1973, with a $2,500 midpoint*. The vehicle would be assessed at the *85% level* on the depreciation scale based on the DMV's practice of placing nonresi-

dent vehicles on the depreciation scale in the year of purchase of the first person to register the vehicle in California, rather than the year first sold to the original consumer. The license fee calculation would be $2,500 x 85% x 2% = $42.50 which rounds to $42. The out of state vehicle is thus assessed a license fee of $43 rather than $34; 24% higher.

103. The discrimination in the license fee assessment continues throughout the depreciable life of the vehicle because license fees are charged each year based upon the depreciation schedule. See Stipulated Facts, No. 31.

104. If a nonresident vehicle starts higher on the depreciation schedule, except in rare cases not relevant to this action, the nonresident vehicle is assessed overall higher fees in the succeeding years.

105. Applying the depreciation schedule to the previous example demonstrates the continuing discrimination.

	1973	74	75	76	77	78	79	80	81	82	TOTAL
Res.	$34	26	21	13	9	4	4	4	4	4	=123
Nonres.	42	35	27	20	15	12	7	5	2	2	=167

In this example, the discriminatory treatment results in overall license fees to the non-resident vehicle 36% greater than those charged to the resident vehicle. The Court finds that this is a significant difference.

106. The State acknowledges (at A.G. pp. 23-25) that prior to the amendment in 1977 of 10753.2 (the depreciation schedule section) there was absolutely no legal justification for applying the depreciation schedule to nonresident vehicles differently than as to resident vehicles.

107. Prior to the 1977 amendment of the depreciation schedule section there was no legal basis whatsoever for the DMV's practice of discriminating against nonresident vehicles. After the 1977 amendment, the DMV did have a ba-

sis for its practice -- a statute which, if DMV is interpreting it correctly, *requires* the DMV to assess nonresident vehicles differently than resident vehicles and, thereby, violates both the Commerce Clause and the Equal Protection Clause of the United States and California Constitutions.

108. There is no evidence to support the DMV's contention that only the date of the last sale can be obtained on a nonresident vehicle.

109. From 1948 until January 1, 1978, R&TC § 10753.2(c) provided that the depreciation schedule would be applied to a vehicle "... starting with the year first sold *to a consumer as a new vehicle...*"[emphasis added]. The statute said "a consumer" not "a California consumer." The statute said nothing about where the vehicle was purchased, whether the original customer registered the vehicle in California, or whether he was a resident of California.

110. Until late 1967, the year model of a vehicle was used as the starting point on the depreciation schedule for both California and nonresident vehicles. In 1967 the DMV began commencing the depreciation of out-of-state vehicles with the date of purchase by the first person to register the vehicle in California. See, R&TC § 10753.2, Stipulated Facts, No. 38.

111. Nearly thirty years of administrative interpretation was changed with out public hearings or revised regulations. Instead of starting with "... the year first sold to a consumer as a new vehicle..." the DMV began the commencement of the schedule for nonresident vehicles with the date of purchase by he first person to register the vehicle in California. R.T. p.3 l. 24 to p.40 l. 7. The depreciation schedule for an out-of-state vehicle can start "... with the year first sold to a consumer as a new vehicle...".

112. The DMV did not, however, re-commence the depreciation schedule for resident or ex-nonresident vehicles

which were already registered in California in 1967. Those vehicles registered in California prior to 1967 were allowed to retain the VLF class assigned by DMV.

113. This fact indicates that DMV's treatment of vehicles brought into the state since 1967 is incorrect, because the statute did not and does not distinguish between vehicles first registered in California before or after November 1967.

114. A 1978 amendment to the Revenue and Tax Code supports plaintiffs' position.

115. At the encouragement of the DMV, the Legislature amended R&TC § 10753.2(c) effective January 1, 1978 to specify when the depreciation schedule started when there was no sale to a consumer as a new vehicle, such as in the case of a homemade vehicle. When a person builds his own vehicle, uses it for a while, then sells it, there is never a sale to a consumer as a new vehicle. The change added the phrase "... or was first purchased or assembled by the person applying for original registration in this state..."

116. Explaining this change in the law, the legislative counsel's digest provides in part:

> "*Existing law* provides for the depreciation of the market value of a vehicle, for the purpose of determining the amount of license fee, *commencing with the year it was first sold to a consumer as a new vehicle*. This bill would *instead* provide for depreciation to commence with either the year the vehicle was first sold to a consumer as a new vehicle or the year the vehicle was first purchased or assembled by the person applying for original registration in this state." (Emphasis added.)

Stats. 1977 ch. 821 p. 1004 SB 417.

117. In summary, the clear words of the statute prior to 1978 required the depreciation schedule to commence when the vehicle was first sold to *any* consumer, not when it was sold to the first consumer to register it in California.

118. The legislature supported this interpretation in amending the statute in 1978 to remove the confusion as to when the depreciation schedule started if a vehicle were constructed by the owner or where the person purchased a homebuilt vehicle.

119. The legislative history indicates no intent on the part of the Legislature to treat vehicles purchased out-of-state any differently than vehicle originally purchased in California.

120. "California base price" and "California delivered price" for non-California vehicles are the same. When read together, §§10753 and 10753.2 make it clear that both the price and the commencement date should be established as the "... year first sold to a consumer as a new vehicle...."

121. If there is any ambiguity in §10753 defining the base price, there certainly is none in §10753.2 describing the starting date.

122. The DMV has incorrectly misinterpreted the proper base price for vehicles originally sold out of state.

123. Defendants sought to offer Exhibit 134 to support their position in this regard. Plaintiffs objected thereto on the grounds that there was no foundation and the documents were hearsay. Those objections are sustained.

USE TAXES

THE STATUTE AND REGULATIONS DO NOT AUTHORIZE THE COMPUTATION OF USE TAX FOR VEHICLES ON COST BASIS.

124. The second type of taxation of vehicles in California is either the "sales" tax or "use" tax. Sales tax on vehi-

cles applies only to sales by licensed California dealers. Stipulated Facts, No. 51. Any other person who sells a vehicle, even if he has a sales tax permit, does no pay sales tax on the sale and is not authorized to collect a sales tax reimbursement. The tax charged on sales that do not involve a dealer is the use tax. Vehicles are an exception to the general rule that private party transactions are not subject to tax. As applied to vehicles, the use tax is designed to complement the sales tax and applies when a person buys a vehicle from a private party, or purchases a vehicle out of state and brings it into the state. Use tax rates are the same as the sales tax rates. Stipulated Facts, No. 52.

125. Pursuant to agreement between the DMV and the SBE, beginning in 1963 and continuing to the present, the DMV has collected the use tax on behalf of the SBE. Stipulated Facts, No. 53.

126. All use tax due must be paid to the DMV in order to register a vehicle. Veh. C. § 4300.5.

127. What is now § 6276 was originally §6011.5. The latter irrebuttably presumed the sales price of a motor vehicle to be the market value determined according to the Vehicle License Fee calculation. At the time of passage the State had just begun to collect use tax on private party motor vehicle transactions where the seller sold more than one vehicle in a year. Prior to that time such transactions were exempt, as are other purchases from non-retailers. (R.T. p.33 ll. 2-33.)

128. In 1965 use tax was first collected on all private party vehicle transactions, and the presumption was made rebuttable.

129. The presumption is unique in that it operates in favor of the party with the best access to the facts - the owner.

130. No direct evidence of the reasons for the 1965 change to 6276 has been produced by the DMV, even though the DMV encouraged the legislation. (A.G. p.36)

131. There had been complaints by registrants who were being asked to pay more use tax than they would have paid based on the actual purchase price.

132. DMV's internal memoranda indicate that the 1965 amendment was to allow for *registrants* the opportunity to challenge the presumption of value. For instance, Exhibit 18 says that the use tax base shall be the chart price except "... when the *applicant submits satisfactory evidence* that the sales price was other than the market value." Exhibit 113; page 2 "USE TAX - rebutting the VLF value as sales price," states: "It is the policy of the department to *extend to an applicant ... every opportunity to present evidence that the sales price was less than VLF market value.*" (Emphasis added.) See, also, Exhibits 111 and 135.

133. The DMV applied the presumption for California and non-California vehicles until 1967, at which time the DMV began requiring the first registrant of a non-California vehicle to provide a certificate of purchase price. (R.T. p.33 l. 19 to p.34 l. 5.)

134. Four years later, §6276 was amended. The 1971 amendment to §6276 shows that the Legislature did not intend to eliminate the presumption. It had before it a proposal to eliminate the section but rejected that proposal and instead chose to modify the presumption to add a 1.2 factor to comport with studies prepared by the State that showed that use tax based on actual price would yield 1.2 times the amount yielded by using the VLF value.

135. By extending the practice of requiring certificates of cost from registrants of nonresident vehicles to registrants of resident vehicles as well, effective November 15, 1976, the DMV and SBE have administratively written

§6276 out of the statute book. Since the DMV now requires a certificate in all cases, (R.T. p.53 ll. 10-13) the statute never applies. However, as recently as 1982, the Legislature has indicated that it did not want §6276 ignored. The Legislature amended §6276 again in 1981 to provide that use tax on mobile homes be paid to the Department of Housing rather than to the DMV. The presumption was left intact. In 1982, Section 6276.1 was added which makes an exception to 6276 for certain mobile homes.

136. The Attorney General's opinion (Exhibit 77) confirms that the DMV was justified in relying upon the presumption. The DMV repeatedly urged the SBE to get a statutory change if the SBE did not want the presumption utilized. A.G. p.40 l. 10.

137. R&TC 6276, which specifies that the use tax base is *presumed* to be 1.2 times the VLF market value, has only two conditions to the application of the presumption: (1) the purchase cannot be from an out-of-state *dealer or manufacturer*, and (2) the purchaser must pay the use tax to the DMV. (R&TC Section 6292 and Vehicle Code §4750 specify that use tax is to be paid to the DMV upon first registration.)

138. The section does not differentiate between a resident vehicle or an out-of-state vehicle, other than in the treatment of purchases from *dealers* or *manufacturers* out of state.

139. Accordingly, purchases of nonresident vehicles from non-manufacturers and non-dealers qualify for the presumption.

140. Likewise, Adm. C. §1610(c), which deals with the same subject, does not add any requirement that the vehicle was previously titles or registered in California.

141. From 1967 to November 1976, when assessing use tax on California vehicles, the DMV did not ask for a bill of sale or other documentation showing "cost." Stipulated Facts, No. 41. The DMV discouraged presentation of such documents unless beneficial to the taxpayer. Use tax on California vehicles was assessed on the rate book or "presumed" price. However, a certificate of cost was required for nonresident vehicles. Stipulated Facts, No. 60. As shown in the DMV's "Study of Vehicle License Fees," the requirement of a certificate of cost on the first registration of a nonresident vehicle resulted in "significantly" higher use tax than would have been paid had the vehicle been a California vehicle. See, Exhibit 56.

142. The inequality that resulted from using the two different methods of assessing use taxes was recognized by the DMV. See, Exhibit 56, 61 (particularly p.2 of attachment captioned "Summary of Study of DMV Vehicle License Fee Schedules For Vehicle Use Tax Purposes"). See, also, Exhibit 62.

143. Although this discrimination in method in computing use tax based upon discriminatory VLF classifications applied to the first person to register the nonresident vehicles, subsequent California purchasers of nonresident vehicles also paid higher taxes because the first person paid more.

144. The improper interpretations of sections 10753, 10752.2 and 6276 by the DMV and SBE are particularly striking when the sections are considered together. If one assumes that an out-of-state vehicle can have a "market value" determined from a "California base price" depreciated from the "year first sold to a consumer as a new Vehicle", it is clear that such market value may be more or less than the price paid by the current owner. Based on these premises, which the Court holds as the proper statutory

construction, the statutory equation is logically sound (using first year's depreciation in the example):

Presumed price = 1.2 X .85 X suggested retail price

145. However, if one assumes, as the State argues, that a nonresident vehicle cannot have a "California base price," and that cost must by used and then depreciated to determine market value, the statutory equation is logically inconsistent and one is left with a mathematical absurdity:

Cost = 1.2 X .85 X Cost, or

Cost = 1.02 X Cost

146. Using the same example as set forth at paragraph 102 above, the use tax on the identical California and nonresident vehicles would be calculated as follows using a 6% rate:

Upon a transfer of title to the California vehicle on January 1, 1973, the DMV would have determined that the market value for VLF purposes was $1,720 ($4,300 x .4), the presumed price for the tax purposes under Section 6276 was $2,064 ($1,720 x 1.2), and the use tax would be $2,064 x 6% = $124. Upon registration of the "non-California vehicle" on January 1, 1973, the DMV would have demanded a certification of the price paid by the owner at that time ($2,495) and would have assessed use tax at $2,495 x 6% = $150. If both vehicles were sold again on January 1, 1976, for $1,700, and their registrations transferred, the use tax collected by the DMV would have been $46 on the "California vehicle" ($4,300 x .15 x 1.2 x .06 = $72). The vehicle originally sold outside of California was now registered in California, so the 6276 presumption would have been applied. In the 1973 calculation the use tax was higher for the vehicle originally sold out-of-state because the presumption of Section 6276 was not applied. In the 1976 calculation, the presumption was applied in both cases, but the use tax was higher because the pre-

sumed sales price was higher for the vehicle originally sold outside of California than for the California vehicle ($1,200 v. $774).

147. Even though the operative use tax statute expressly exempts only out-of-state dealer and manufacturer transactions from its presumption of applying the favorable price used for VLF purposes for use tax determination, defendants DMV and SBE have carved out an additional exception not found in the statute, saying that all nonresident vehicles are to be denied the favorable price presumption granted to resident vehicles.

148. The presumption partially adjusts for the fact that vehicles are discriminated against because they are not eligible for the occasional sale exemption. It speeds up processing and discourages cheating.

149. The SBE's position on use tax collection has been consistent through the years - collect use tax in a way that will raise the most revenue.

150. The DMV's position on use tax collection has not always coincided with the SBE's position. Prior to the amendment of 10753 in 1967, in a memorandum to all DMV offices dated February 28, 1966, Exhibit 21, the DMV's Registrar made the DMV clear:

> "You are requested to review Section 6276 of the Sales and Use Tax Law and the 'EXCEPTIONS:' listed in Section 28.500 of the Manual of Registration Procedures.
>
> "*It is the policy of the department to extend to an applicant who is required to pay use tax based on the VLF market value every opportunity to present evidence that the sales price was less than the VLF market value.*" See, also, Exhibit 63. (Emphasis ours)

151. The SBE's position was that much larger amounts of revenue would be collected if the law (§6276) did not require the assessment of use taxes based upon the presumed VLF "market value." The DMV Study of License Fees, Exhibit 56, clearly supported this position.

152. Whereas beginning in 1967 the DMV began collecting use tax on nonresident vehicles based on cost, the SBE sought to have use taxes assessed on all vehicles on the basis of cost.

153. Beginning in 1971 the DMV and SBE had several conferences in an attempt to agree upon a joint legislative proposal to increase use tax revenues. See, Exhibit 61.

154. The DMV's principal opposition to the SBE's position was that the SBE's proposals would require additional administrative effort by the DMV in collecting the use tax. See, Exhibit 65, the DMV's "Report On Vehicle Licensing And Titling Revenues (Office of Auditor General)," which is an analysis of a report prepared by the Office of the Auditor General. See, also, Exhibit 64, DMV Staff Services Memorandum dated April 23, 1973.

155. In 1971 a bill was introduced to repeal the formula price and to base use taxes exclusively on cost.

156. The DMV and SBE finally agreed upon and supported a proposed amendment to 6276 which would increase use tax revenues that would be easier to administer for the DMV.

157. The proposed legislative change added a factor of 1.2 to the VLF market value when determining use tax for non-commercial vehicles. See, Exhibit 61.

158. The legislature rejected the cost basis method and modified the formula as supported by the DMV, effective January 1, 1972. See, Exhibit 66.

159. The legislative change in 1971 did nothing to correct the gross inequity that existed between resident and nonresident vehicles, it merely increase the tax by 20%.

160. This inequality was recognized at various times when consideration was given to basing use tax on cost, not just as to out-of-state vehicles but on all vehicles. See, e.g., Exhibit 67, June 26, 1973 memorandum from Allmendinger to Cook, page 2, stating: "The advantages (reasons) for collecting use tax based on selling price include equality...".

161. However, the DMV recognized that to base use tax on other than the 6276 presumption, legislative change would be necessary. See, Exhibit 64, April 23, 1973 memorandum from Brown to Chapman, page 2, stating:

> "Legislation would be necessary and an amendment made to Revenue and Taxation Code Section 6276 if a deviation from the present procedure is desired."

See, Exhibit 68. See, also, Exhibit 67, which states at p.3:

> "Implementing this recommendation (charging use tax based on cost) requires legislation. The scope of this report did not include providing proposed legislation. Such legislation should be discussed with the State Board of Equalization."

162. The cost certificate requirement for all registrants also constitutes requiring the filing of a "tax return" contrary to law. The certificate of cost is a tax return that is not authorized by the statutes.[7]

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7. *Webster's New Collegiate Dictionary* defines "tax return": "2. ... d(1) a formal statement on a required legal form showing taxable income, allowable deductions and exemptions, and the computation of tax due (2): a list of taxable property ...." *Black's Law Dictionary* gives no definition. *Oran's Dictionary of the Law* has the following

163. The certificate of cost demanded by the DMV is a form furnished by the state, with a number, giving the taxpayer's name and signature, contains the date and price of the purchase, is required by the DMV of all persons registering a vehicle not previously registered to the person (unless some exemption certificate applies).

164. The fact that the form does not require the taxpayer to calculate the tax is irrelevant. There are a number of different kinds of tax return that do not require the actual calculation of the tax. An example is Internal Revenue Code Section 6060.

165. When a tax return is required, it is required by statute. Examples are: Person Income Tax, §18401; Partnerships, §17932; Bank and Corporation Tax, §25401; Sales and Use Tax, §6452 *et seq.*; Motor Vehicle Fuel License Tax, §7651; Insurance Tax, §12302.

166. However, §6292(c) relieves a person who pays use tax to the DMV from any obligation to file a return.

167. The State makes the point hat the filing of the cost certificate can be compared to the obligation of a retailer to file a sales tax return. A.G. p. 130. The burden is roughly

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definition for tax return" "The form used to report income, deductions, etc., and to accompany tax payments and requests for refunds." *Federal Tax Coordinator 2d*, S-1002 says, "A tax return is a report by a taxpayer setting forth facts necessary to establish the amount of tax. of any, that is due from him as a person liable for the payment of a particular tax." A more complete definition that a tax return is a completed form proscribed by the government, usually assigned a form number, identifying the taxpayer, requiring a signature, containing the facts from which a tax liability is or can be calculated, required as a matter of course without an individual request from the authorities form all taxpayers to which it applies. This definition fits all of the common types of returns -- income, gift, sales, use, and payroll. It would exclude forms that a taxpayer is requested to complete as art of an audit.

similar; however, the filing of the sales tax return is required by §6452. If the Legislature desired persons who paid use tax to the DMV to file returns, it would not ave exempted them in §6292.

168. The State incorrectly argues that §§7053-7055 justify the SBE and DMV requirement of a cost certificate.

169. Section 7053 and the regulations thereunder do not require a purchaser of a motor vehicle from a private party to prepare a certificate of the purchase price.

170. The relevant part of Section 7053 requires users to "keep such records, receipts, invoices, and other pertinent papers in such form as the board shall require."

171. The State Board of Equalization has implemented its requirements in Regulation 1698 which reads in pertinent part:

> "(a) ... Every ... person storing, using, or otherwise consumed in this state tangible personal property purchased from a retailer, shall keep adequate and complete records showing: ... (3) total purchase price of all tangible personal property purchased for sale or consumption o lease in California. The records must include the normal books of account ordinarily maintained by the average prudent businessman engaged in the activity in question, together with all bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account as well as all schedules or working papers used in connection with the preparation of tax returns...."

172. The above language is aimed at businesses. The ordinary prudent man buying a vehicle for personal use has no need to keep the items listed -- items appropriate for a business use.

173. Further, the DMV's requirement of a certificate under penalty of perjury goes well beyond a "record ... [of the] ... purchase price. ..."

174. In the context of an individual purchasing a vehicle for personal use, a notation on a piece of paper would satisfy the regulation. The DMV as agent for the SBE required more -- it required a return.

175. Regulation 1698(f) reads, "Failure to maintain and keep complete and accurate records will be considered evidence of negligence or intent to evade the tax and may result in penalties or other appropriate administrative action." The penalty for negligence is only 10% of the tax. §§6292, 6591. Undoubtedly, representative plaintiff Woosley would have paid a negligence penalty of $ .60, rather than being charged $1,494 more than he would have been had he bought a California vehicle.

176. Regulation 1598(e) also provides: "All of the above-described records must be made available for examination on request by the board or its authorized representative." In other words, the SBE can audit one's records. This does not justify requiring a return where one is specifically not required by law. It is clear that §7053 does not apply to the situations described in §6276.

177. Section 7054 does not authorize the DMV to demand a certificate. The statute simply authorizes the SBE to audit.

178. Section 7055 gives the SBE the authority to require sellers within its jurisdiction to report on sales which are subject to use tax, but it has not done so.

179. The SBE has implemented this section with 18 Adm.C. 1687 which simply requires information returns from certain persons who solicit orders. It is not relevant to this action. Many of the sellers making the sales which

are the subject of this action are located outside of California and are not subject to California's jurisdiction.

180. Nowhere is there any evidence that the Legislature intended to abandon the presumption totally, and yet that is exactly what the State has done since November 1976, when it began *requiring* certificates of cost not only for nonresident vehicles, but for all vehicles.

181. In 1973 the SBE renewed its efforts to convince the DMV to collect use tax based on sales price or cost. See, Exhibits 67-70.

182. After a series of meetings the DMV and the SBE agreed "to retain the present method of determining use tax base on the VLF class except when evidence of the purchase (selling) price is a part of the application, in which case the tax is then to be computed on such purchase price." Exhibit 70.

183. A New Interagency Agreement was executed in December 1973. The Agreement is Exhibit 71.

184. Even though the 1973 Interagency Agreement did not require discrimination against nonresident vehicles, the DMV continued its practice of discrimination against such vehicles.

185. In a 1974 Informational Memorandum to "All Holders of the Manual of Registration Procedures," Exhibit 41, Elmer Brown, the DMV Registrar, stated the DMV's practice in determining market value for VLF *and use tax* purposes:

> "Revenue and Taxation Code Section 19753 requires the department to determine the market value of a passenger vehicle upon the basis of the California suggested base price as established by the manufacturer. These are vehicles sold by California dealers.

> "*On all other vehicles* (including nonresident), the department shall determine the market value of the vehicle *on the basis of the cost price to the purchaser.*" (Emphasis added)

186. After entering into the 1973 Interagency Agreement, the SBE continued its efforts, in effect, to administratively re-write §6276 to *require* the DMV to secure cost or sales price information on every use tax transaction. See, Exhibits 72, 73 and 78.

187. The DMV and the SBE conferred and drafted a joint memorandum dated June 9, 1975 entitled: "Identification and Review of Problem Areas in the Interagency Administration of the Vehicle Use Tax." Exhibit 74.

188. The memorandum identifies as the "problem area" of the highest priority:

> "The conflict caused by the Section 6276 presumption that sales price is the market value. The presumption is that the sales price is the market value as that value is determined by the VLF chart. The presumption may be rebutted by evidence which establishes that the sales price was other than such amount. The conflict arises in determining whether DMV should secure evidence in all transaction to rebut that presumption. Moreover, DMV personnel appear to be oriented to giving the taxpayer a break by refusing to accept bills of sale when the chart would result in less use tax being paid. Not computing tax on the purchase price when it is available is contrary to both DMV instructions (28.000) and the Interagency Agreement for Administration of the Vehicle Use Tax."

189. On June 20, 1975 the SBE and the DMV held a high level meeting. The Minutes of the meeting, Exhibit 75, reflect:

"Purpose of the meeting was to resolve problem areas ad issues identified by Board of Equalization and Department of Motor Vehicles."

The Minutes further reflect:

"The group spent considerable time discussing the conflict of interpretation of section 6276 (Revenue and Taxation). *The present language in section 6276 was drafted at DMV's request to facilitate clerical handling*. The current agreement between the Board of Equalization and Department of Motor Vehicles states that the sales price will be a tax indicator. However, DMV does not encourage bills of sale or other evidence." (Emphasis added)

190. As reflected ins Exhibit 74, the SBE continued to press for DMV to utilize evidence of cost to rebut the presumption on use tax collections. To achieve this end the SBE formulated a position that the statutory presumption of §6276 should be rebutted by the DMV in every transaction. The SBE position paper is Exhibit 76.

191. The SBE requested an interpretation of §6276 form the attorney general, which was rendered in January 1976, Exhibit 77, which discussed the presumption if §6276. It said that the DMV did not have to ask for evidence of the purchase price, but could not ignore evidence presented: "Exclusive reliance on the presumption therefore would appear to conform with the legislative intent of enacting §6276 as a means of expediting the collection of the use tax."

192. At no time did the DMV or the SBE conduct any public hearings or give any public notice on the proposed change in use tax collection procedures that had been in force since at least 1965.

193. Despite the Legislature's refusal to repeal §6276 in 1971, despite the repeated legislative rejection of the "cost"

basis for determining VLF, despite the acknowledgment that a change to the "cost" basis from the rate book method would require legislation, and without any change in the law, the DMV and the SBE agreed that, effective November 15, 1976, the DMV would require a certificate of cost not only on non-resident vehicles, but on *all* private party sales of vehicles. See, Interagency Agreement, Exhibit 79.

194. A joint press release by the DMV and SBE in November 1976, Exhibit 83, said:

> "Heretofore, DMV, *as authorized by statute, collected use tax based on the same estimate market value of the vehicle as use to figure the annual license fee*, unless a bill of sale or other acceptable document indicating the actual purchase price was presented by the buyer." (Emphasis added)

195. The press release estimated that the additional revenue from the change would be about 30% or $20,000,000.

196. This change did not affect the first [person to register a nonresident vehicle in California, because the DMV was already basing that use tax on purchase price.

197. This *unauthorized* change in practice eliminated the use tax discrimination, but it did so by illegally charging most vehicle buyers more tax than the law requires.

198. As a consequence of the illegal change in the DMV use tax collection practice, the use tax collected in the year following the change jumped from $7.84 million per month to $10.64 million per month. See, Exhibit 80.

199. After reaching the Agreement to begin assessing use taxes on all vehicles based on cost, the DMV put the Agreement into effect by issuing procedural guideline to its offices, Exhibits 81 and 82, and news release to the public, Exhibit 83.

200. The DMV and SBE also undertook a study based upon scientific sampling to determine the impact of the new procedure n actual use tax collections after November 15, 1976. See, Exhibits 84 and 85. The Study, Exhibit 86, demonstrated that there was an actual 47% increase in total use tax revenues after the DMV began assessing use taxes based upon cost.

201. These figures clearly demonstrate both the magnitude of the DMV and SBE's post-1976 illegal use tax collection practice and the obvious and significant impact on interstate commerce of the unequal use tax collection practice that existed prior to November 1976.

202. Both the DMV and the SBE have recognized the impact that their practices have upon commerce. See, in particular, Exhibit 90, DMV Director Sillas to SBE Chairman Bennett, with numerous attachments, one of which is captioned "Purpose for imposing a Use Tax." This document states:

> "Although a significant sum of revenue is being raised annually, the primary purpose for imposing a use tax on private party sales of vehicles is to protect licensed dealers from tax-free competition. This competition, if not equalized, would have the result of reducing the tax revenue and eroding the State's tax base.
>
> "While not in the category of tax-free competition, *private party sales have a competitive advantage over dealer sales* because a substantially lower tax is collected by DMV through use of charts based on VLF values. This competitive advantage has the same effect upon the State's tax base of reducing the tax revenue.". (Emphasis added)

203. To the extent that, prior to 1976, nonresident vehicles were charged use tax based on purchase price, while

California vehicles were based on the chart method, California vehicles enjoyed a distinct competitive advantage over nonresident vehicles. A significant number of vehicles is [sic] purchased each year from private parties in interstate commerce.

204. DMV Director Alexis, in a Legislative Recommendation dated December 13, 1977, Exhibit 88, to Douglas Bell, Executive Secretary of the Board of Equalization, cast grave doubts on the propriety of the change in use tax collection procedure.

205. Writing one year *after* the administrative change went into effect without benefit of public notice, public hearings or Legislative change, Director Alexis stated:

> "As you know, before November 15, 1976, use tax on the sale of vehicles was based on the market value determined by the Vehicle License Fee Law. The Department of Motor Vehicles and the Board of Equalization executed an Interagency Agreement on August 16, 1976, that interpreted the relevant Vehicle Code and Revenue and Taxation Code Sections (specifically Revenue and Taxation Code Section 6276) to require that both sales and use tax be based on the selling price of a vehicle. I believe that legislation should be drafted and submitted by the Board of Equalization, with support and approval of this department, clearly establishing that such tax must be based on the selling price of a vehicle.
>
> * * *
>
> "I strongly believe that Section 6276 should be amended to clearly indicate tat sales and use tax is based on the selling price of a vehicle. I have requested Jack Cary of my staff to assist your office in drafting an appropriate amendment to Revenue and

Taxation Code Section 6276. Jack can be contacted at 5-4511.8

206. By interagency agreement between the DMV and the SBE, without the benefit of public hearings and in the face of the Legislature's repeated refusal to amend the codes to provide for cost basis assessment, the statutory presumption was abandoned.

207. The evidence clearly demonstrates an admission by the State of the disparate treatment of resident and nonresident vehicles and of the fact that nonresident vehicles were charged "substantially higher" use taxes than identical resident vehicles.

208. The State argues (at A.G. p.34) that the SBE "consistently" held that the market value presumption was subject to rebuttal, and "consistently" asserted liability for additional tax when the "true selling price" became known. Cf., R.T. p. 31 l. 14 to p.32 l. 16.

209. As evidence of the "consistent" practice, defendants showed that on *five* occasions in 1974 this practice was employed. Exhibit 61, the DMV revenue "stat runs," reflect that in 1974 there were 1,261,630 new registrations of resident vehicles and 17,433,642 renewals of registrations of resident vehicles. There were also 493,894 nonresident vehicle registrations in 1974. Of the resident vehicles, the evidence shows that *five* paid use taxes based on actual cost. Of the nonresident vehicles all 493,894 paid

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8. Director Alexis's strongly worded recommendation was not followed because there was then pending litigation challenging the new DMV/SBE practice. See, Exhibit 94. That litigation, *Golden State Moblehome Owners League Inc. v. SBE, DMV*, S.F. Sup.Ct. No. 715-684, was subsequently decided against the State, and has been appealed.

use taxes based on cost. Mr. Cary's testimony at trial confirmed this. (R.T., p.34 ll. 2-5)

210. Further, the State's evidence showed that the so-called "audit" consisted only of reviewing the registrant's file for cost information. No cost certificate was required for resident vehicles. See, A.G., p.26; R.T., p.31, l. 2 to p.32, l. 16.

211. The entire history of the SBE's efforts to change the use tax collection system to cost basis in order to increase collections, including the numerous studies done, all fully support plaintiffs' position that collecting VLF and use tax on resident vehicles based on the Rate Book, and on nonresident vehicles based on cost resulted in significant discrimination against vehicles purchased interstate.

212. The operative effect of the formula price or chart method of §6276 is similar to several other tax law provisions. A taxpayer can take a tax deduction based on the mandated mileage allowance, or he can prove the actual costs of operating his vehicle for business purposes. He can take a tax deduction for sales and use taxes paid. He can take percentage depletion, or he can take cost depletion. R&TC §§17686-17686.5. He can take a standard deduction or he can prove his actual deductions. R&TC §17171. Other examples are *per diem* travel allowances, and gasoline deductions.

213. Perhaps the telling argument against defendants' interpretation is that had the legislature intended that the use tax be based upon the actual sales price, it could have easily so provided. The legislature did not.

214. Such an interpretation would be arbitrary and unreasonable, even if the Manual were a regulation. All regulations must be reasonably necessary to effectuate the purpose of the statute. Gov. C. §11374. *Morris v. Williams* (1967) 67 C.2d 733, said

"Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them. They must conform to the legislative will if we are to preserve an orderly system of government."

PLAINTIFF WOOSLEY

215. In early 1976 plaintiff purchased a 1936 Auburn model 8-852, Supercharged, two-door speedster, chassis number 3467OE outside of the State of California from a person who was not a dealer or manufacturer. Stipulated Facts, Nos. 3, 4.

216. The Rate Book assigned a "36AL" coding to 1936 Auburn, model 8-852 Supercharged Speedsters. See, Exhibit 3.

217. Woosley attempted to title, register and license the subject vehicle on the basis of a "36 AL" coding. When the clerk at the DMV Pasadena office refused to do so on November 12, 1976, Woosley appealed to her supervisor, then to the office manager. They each demanded a certificate of cost, which he would not give, pointing to the "statutes and regulations."

218. Later on that day, Woosley mailed all registration documents, plus a check for $50, to DMV headquarters. Stipulated Facts, No. 10.

219. The DMV continued to demand a certificate of cost, and would not process the vehicle until one was supplied under protest on December 28, 1977. Stipulated Facts, No. 11.

220. The DMV assigned Woosley's vehicle a classification of "76FT." Stipulated Facts, No. 18.

221. Had the DMV processed plaintiff's vehicle as a "36AL" and had it followed R&TC §6276, the license fee

would have been $2 (Stipulated Facts, Nos. 21, 61) and the use tax would have been $6.

222. Because a certificate of cost was required, and use and license fees were charged upon the purchase price rather than the rate book code, a use tax of $1,500 and a license fee of $427 was imposed. Stipulated Facts, Nos. 55, 16. Since learning of the DMV's position on these matters in 1976, Woosley has given preference to vehicles previously registered in California, and he has advised others to do so.

TAXING CALIFORNIA AND NONRESIDENT VEHICLES DIFFERENTLY VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

223. The federal constitution gives Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Art I, §8.

224. In one of the earliest cases defining the parameters of the Commerce Clause, commerce was broadly defined as "commercial intercourse" in all its branches, but not restricted to buying and selling. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed.23 (1824). Subsequent cases have enlarged this definition, so that today a greatly expanded scope of the federal commerce power is recognized. See, e.g., *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed 1440 (1944):

> "Not only, then, may transactions be commerce though noncommercial, they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." 322 U.S. at 549-550, 64 S.Ct. at 1172, 88 L.Ed. at 1455.

225. Except under the Twenty-First Amendment (relating to intoxicating liquors), and insurance, a state has

no power to erect barriers against interstate commerce or to place any restrictions on, or Discriminations against, interstate commerce. See, generally, *West v. Kansas Nat. Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716 (1910); *Baldwin v. Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935). The VLF and use tax, as applied, discriminate against interstate commerce. States can take no action which discriminates against the movement of goods (even garbage) from one state to another. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

226. While the courts have had some problem resolving the question of when states may tax interstate commerce and its instrumentalities, the courts, and particularly the Unites States Supreme Court, have been singleminded in holding that any tax which discriminates against interstate commerce violates the Commerce Clause of the Unites States Constitution.

227. The State herein claims, without supporting authority, that private party transactions do not have the protection of the commerce clause. However, *Unites States v. Southeastern Underwriters* (1944) 322 U.S. 532, 549, holds that "transactions [may] be commerce though noncommercial."

228. Where economic protection is effected by state legislation, a virtually *per se* rule of invalidity has been erected. *Lewis v. B.T. Investment Manager Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed. 2d 702 (1980). See, Exhibit 90, indicating that economic protection of California interests was a recognized effect of the discrimination at issue in this suit.

229. The State contends (at A.G. p. 115 ll. 18-24) that no significant competitive advantage can be shown and that

there is no significant competition between private parties across state lines.

230. These conclusions are contradicted by the evidence in the record. See, R.T. p.28 l. 12 to p.30 l. 13; p.34 l. 16 to p.35 l. 24).

231. The courts have interpreted the Commerce Clause to prohibit the states from placing unreasonable burdens on interstate commerce. Any state action which discriminates against interstate commerce is *per se* an unreasonable burden. *Lewis v. B.T. Investments Managers Inc., supra.* Thus, cases concerning only "burden" without discrimination are inapplicable.

(a) In *Walling v. Michigan*, 116 U.S. 446, 6 S.CT. 454, (1886) the Supreme Court said:

> "...[A] discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is in effect, a regulation in restraint of commerce among the States, and as such, is an usurpation of the power conferred by the Constitution upon the Congress of the Unites States." 116 U.S. at 455, 29 L.Ed. at 694.

(b)*American Steel Wire Co. v. Speed*, 192 U.S. 500, 519, 24 S.Ct. 365 (1904), held that in order that a levy of a tax upon property brought from another state not be a direct burden upon interstate commerce, property so situated must be *taxed* ". . . without discrimination, *like other property situated within the state* [emphasis added]." even after it had come to rest within a state. 192 U.S. at 520.

(c) In *Darnell v. Memphis*, 208 U.S. 113, 28 S.Ct. 247, 52 L.Ed 413 (1908), the Court held that a Tennessee statute exempting from taxation articles manufactured in the state, was a discrimination against similar property brought into Tennessee from other states and was, therefore, a

direct burden on interstate commerce and repugnant to the Commerce Clause.

(d) In *Welton v. State of Missouri*, 91 U.S. 275, 23 L.Ed. 347 (1875), the State of Missouri was found to be unconstitutionally requiring the payment of a license fee by persons who dealt in the sale of goods which were not the growth, produce, or manufacture of the state, while it required no such license from persons selling local products.

(e) Among the cases striking down higher taxation of out-of-state merchants is *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 72 S.Ct. 424, 96 L.Ed. 436 (1952), where Mississippi imposed a privilege tax of $50 per truck operated by laundries which were located out-of-state but which sent trucks into Mississippi. Mississippi laundries were taxed only $8 per truck.

232. In the instant case, nonresident vehicles are taxed at full cost, including all options and accessories, while resident vehicles are taxed at less than cost, with the additional disregard of manufacturers' installed options and accessories, thereby giving the resident vehicles a benefit similar to that enjoyed by Mississippi laundries. See, also, *Best & Co. v. Maxwell*, 311 U.S. 454, 61 S.Ct. 334, 85 L.Ed. 274 (1940), where the court held unconstitutional an annual privilege tax of $250 on any person "not being a regular retail merchant in the State of North Carolina," who displayed samples in any hotel room or house for the purpose of obtaining retail orders where the only corresponding license tax to which local merchants were subject was a tax of $1 per annum.

233. The courts have upheld the constitutionality of use taxes on property purchased in out-of-state transactions *only* when there was a corresponding and equal tax applicable to in-state purchases. In sustaining the use tax of the State of Washington, the court said:

> "[I]n each [out-of-state] situation the burden borne by the owner is balanced by an *equal burden* where the sale is strictly local." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584, 57 S.Ct. 524, 81 L.Ed. 814, 819 (1937), emphasis supplied.

234. No equal burden is imposed where, as in the within action, out-of-state vehicles are charged significantly more than in-state vehicles by reason of the different bases utilized. An *equal* burden is the only one permissible under the Commerce Clause:

(a) In upholding the equal application of the California use tax, in *Southern Pacific Company v. Gallagher*, 306 U.S. 167, 172, 59 S.Ct. 389, 83 L.Ed. 586 (1939), the Court emphasized that there was an *equal charge* against that is used, whatever its source.

(b) In *Chicago Bridge and Iron v. Johnson* (1941) 19 Cal.2d 152, 171, the California Supreme Court said:

> "Forms of state taxation whose tendency is to prohibit the commerce *or place it at a disadvantage* compared to competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing authority in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."

(c) Deductions for trade-ins, when purchases take place in the state, there would be impermissible discrimination by giving in-state vehicles an advantage. *Matthews v. Colorado*, 562 P.2d 415 (Colorado 1977); *Robert Emmet & Son Oil and Supplies Co. v. Sullivan*, 158 Conn. 234, 259 A.2d 636 (1969); *Nuckols v. Athley*, 149 W.Va. 40, 138 S.E.2d 344 (1969); *Commonwealth v. Smith*, Pennsylvania Common Pleas Court, Dauphin

County (1960), P-H State & Local Tax Service, Pa., Para. 23,202.

235. In the instant case, one advantage accorded to California vehicles, but denied to nonresident vehicles, is the exclusion of manufacturer's options and accessories so that a benefit is conferred by reducing the valuation of the vehicle, just as a trade-in allowance would reduce the basis for the taxes imposed. In *Gray v. Oklahoma Tax Commission*, 279 P.2d 843 (Oklahoma 1963), the court held that a use tax which applied to the purchase of agricultural feed outside of the state violated the Commerce Clause because no equal sales or use tax applied to in-state purchases. In *Phillips v. Oklahoma*, 577 P.2d 1278 (Oklahoma 1978), the court held that the $% use tax imposed on out-of-state transactions ran afoul of the Commerce Clause because the state tax rate on in-state transactions was only 2%. *American Modulars Corp. v. Lindley*, 540 O.S. 273, 376 N.E. 2d 575 (Ohio, 1978), held to the same effect.

236. While it is true that the California use tax has been upheld in cases as not being discriminatory where *evenly* applied, none of those cases cited by the State have dealt with the manner in which resident and nonresident motor vehicles are taxed. Further, the cases have stressed that in order to be constitutional a use tax must not discriminate against interstate commerce. While an equal rate is ostensibly imposed by California, i.e., 6% use tax, since the basis for nonresident vehicles is significantly higher than the basis for similar resident vehicles, the effective applicable rate on nonresident vehicles is significantly higher. The result and effect of taxes must be *equal*. Neither an unequal rate nor an *effective* unequal rate is permitted.

237. New York imposed a stock transfer tax which applied when the transfer agent was located in New York, thus out-of-state sales could be taxed. To reduce the chance that New York would drive stock exchange business

out of the state, the transfer tax rates were lower when the sale had taken place in New York. The United States Supreme Court struck down this discrimination between in and out-of-state transactions. The Court said:

> "A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 334-335, 97 S.Ct. 599. 50 L.Ed.2d 514-527 (1977).

The New York Court of Appeal had analogized the tax to a use tax and claimed the tax did not violate the constitution. The United States Supreme Court rejected this argument, stating:

> "In all the use tax cases, an individual faced with the choice of an in-state or out-of-state purchase could make that choice without regard to the tax consequences. If he purchased out of State but carried the articles back for use in State, he pays a use tax of the *same amount*. The tax has treated both transactions *in the same manner*." [Emphasis added.] 429 U.S. at 332, 50 L.Ed. at 526.

The Court dismissed the argument that there was no evidence that the tax had caused any investors to prefer New York transactions.

238. In essence, if there is *any* unequal treatment, the discriminating tax cannot stand.

239. *Complete Auto Transit v. Brady*, 430 U.S. 274, 278, 97 S.Ct. 1076, 1083, 51 L.Ed.2d 326, 336 (1975), *reh. den.*, 430 U.S. 976, 97 S.Ct. 1669, 52 L.Ed. 371 (1975), which is the landmark decision allowing a purely interstate business to be subjected to state tax, set up a four-pronged test. One of those prongs is that the state's tax

must not discriminate against interstate transactions. The California Vehicle License Fee as applied to vehicles originally sold outside of the State does not pass this test, as a vehicle which has been purchased in an interstate transaction pays significantly more license fees and use tax than one which has not.

240. In *Halliburton Oil Well Cementing v. Reilly*, 373 U.S. 64, 10 L.Ed.2d 202, 83 S.Ct. 1201 (1963), *reh. den.*, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963), the Court held that labor and shop overhead could not be included in the tax base of a manufactured goods in the state, since these items were excluded from the taxable base of manufacturer-users located in the state. The basis for California vehicles excludes options and accessories, which are included in the cost basis for nonresident vehicles. Such differential treatment was specifically rejected in *Halliburton*. The court also extended the occasional sale exemption to out-of-state purchased items.

241. Thus, the courts have struck down discrimination resulting not only from exemptions, but also from the application of different *rates, bases* and *methods of calculation*. The improper taxes have included property, stock transfer, wharfage and use taxes. The taxpayers have been manufacturers, seller and users. In many of the cases the taxable event has occurred after the articles were no longer in interstate commerce. In many cases, the financial burden of the discrimination was only a few dollars.[9] In every case, however, once the discrimination was shown, the tax was declared invalid.

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9. Compare, The Study on Vehicle License Fees, Exhibit 56, which concluded that "significantly more" fees were being charged on nonresident vehicles.

242. The calculation of the Vehicle License Fee still in use today for California vehicles gives sellers of those vehicles a competitive advantage over seller of nonresident and ex-nonresidential vehicles.

243. Until November 15, 1976, the application of R&TC §6276 (upon which use tax was calculated) gave sellers of California vehicles a competitive advantage because of the significantly lower use tax on California transactions.

244.The State erroneously contends that the in-state and out-of-state taxes were "relatively equal." In the case of plaintiff Woosley, $2 is not "relatively equal" to $427. $6 is not "relatively equal" to $1,500. The several studies conducted by the DMV and the SBE all concluded that nonresident vehicles were taxed "significantly higher" than resident vehicles.

245. Lack of intent to discriminate is not a defense to a violation of the Commerce Clause.

246. These practices violate the Commerce Clause of the United States Constitution.

THE DIFFERENCE IN VLF AND USE TAX CALCULATIONS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION AND THE CALIFORNIA CONSTITUTION.

247. The Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The principle of equal protection of the laws appears in California Constitution, Section I, Article 11, 21.

248. In the within case, persons registering, titling or licensing vehicles in this State were and are being treated unequally, depending on where the vehicle was acquired.

This discrimination violates the Fourteenth Amendment and the California Constitution.

249. In testing the permissibility of state action in light of the Equal Protection Clause, the courts have applied two rules. In situations involving fundamental interests or suspect classifications the Courts have adopted "an attitude of active critical analysis, subjecting the classification to strict scrutiny." *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S.Ct. 1322, 22 L.Ed.2d 600, 617 (1969); *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 22-23, 112 Cal.Rptr. 786, 520 P.2d 100 (1974). The second test (or "conventional test") merely requires that distinctions drawn by a challenged statute bear some rational relationship to a legitimate state purpose. *Westbrook v. Mihaly* (1970) 2 Cal.3d 765.

250. While the practices of the DMV fail the first test, these practices fail the conventional test as well. The evidence clearly shows that the discrimination is without justification, without a reasonable basis, palpably arbitrary, and not reasonably related to the purposes of the legislation.

251. A State can make classifications without violating the Equal Protection Clauses of the State and Federal Constitutions. There are numerous such examples in the factual background of this case -- distinctions between automobiles and other vehicles, assignment to price classes, the use of statutory depreciation schedules, and discrimination against private party motor vehicle transactions.[10] However, there

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10. At page 129 of their brief, defendants seem to argue that by applying the prescription of 6276 to nonresident vehicles (that is, just as to resident vehicles) would run afoul of the Constitution as this would mean that somehow dealer sales of used cars would be penalized in that the sales tax on those dealer transactions would be higher than on used vehicle private party transactions. However, defendants fail to recognize that resident vehicles were treated more advantageously, so

are some classifications which do not pass muster when measured against the Equal Protection principle.

252. All of the descriptions of the "conventional" Equal Protection test agree that one must determine (1) the purpose of the legislation and whether it is a legitimate purpose, and (2) the relationship between the classifications made by the Legislature (or an administrative body) and the purpose of the legislation.

253. One expression of the standard is the "fair and reasonable" relationship standard. *Louisville Gas & Electric Company v. Coleman* (1928) 277 U.S. 32, 37; *Rinaldi v. Yeager* (1966) 384 U.S. 304, or:

> "The pole star for judging the validity of a particular classification is whether that classification 'rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Department of Revenue v. Amrep Corporation* (1978 Fla. S.Ct) 358 So.2d 1343.

See, also, *Newland v. Board of Governors* (1977) 19 C.3d 705, where the California Supreme Court has recognized that there are several verbal formulas as stated in *Brown v. Merlo* (1973) 8 Cal.3d. 855, 861:

> "Some decisions require the classification 'bear some rational relationship to a conceivable legitimate state purpose' [citations] others that the classification must rest upon 'some ground of difference having a fair and substantial relation to the object of the legislation. [Citations]."

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that the constitutional problems they perceive, if they exist, were already there as to *nonresident* vehicle transactions.

254. "All of the formulas require the court to conduct 'a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals' [citation]. *Cooper v. Bray* (1978) 22 Cal.3d 841. This language reflects that, at least under the California Constitution, the courts have a role which cannot be abdicated. The all-encompassing language of some cases cited by defendants is a relic from an era when the court gave free reign to administrative bodies so long as the strict scrutiny test was not required.

255. Examining the first prong of the test, the *purpose of the legislation*, the purpose must be legitimate. Examples of purposes which the Court has found not to be legitimate are: rewards for past contributions, *Zobel v. Williams* (1982) 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672, *Shapiro v. Thompson* (1964) 394 U.S. 618; to encourage firms to locate in the state by discriminating against out-of-state firms, *Department of Revenue v. Amrep Corporation, supra*; and to raise revenue at the expense of non-residents, *Western and Southern Life Insurance Company v. SBE* (1981) 451 U.S. 648. Courts have been particularly suspicious of distinctions drawn on state lines. See, *Sully v. American National Bank* (1899) 178 U.S. 298; *Blake v. McClung* (1898) 172 U.S. 239. Providing competitive advantages to residents is also an illegitimate state purpose.

256. Administrative convenience is not really a purpose, as the State suggests, but is relevant to whether the classification has the proper relationship to the purpose. (The relationship prong.) Convenience can satisfy the prong in some instances, but not in others. The convenience *avoiding* collection efforts for small businesses was upheld as properly related in *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, but there is California precedent to the contrary. *Gowens v. City of Bakersfield* (1960) 179 Cal.App.2d 282. One of the distinctions is that *Carmichael*

had a social welfare purpose, while *Gowens* and the instant case have only revenue purposes. Another distinction is that the tax in *Carmichael* was on business, while the taxes in *Gowens* and the instant case are predominantly upon individuals. However, avoiding extra administrative costs by penalizing a class is not a legitimate purpose. *WHYY v. Borough of Greensboro* (1968) 393 U.S. 117, 120.

257. A review of the holding in most of the cases relied upon by the State shows they are inapplicable. *Ferguson v. Skrupa* (1963) 372 U.S. 726 [regulation of debt collectors]; *Railway Express Agency v. New York* (1949) 336 U.S. 106 [regulation of advertising on trucks]; *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, [distinctions in laws relating to the workplace which treated women differently than men]; *Henry's Restaurants of Pomona, Inc. v. SBE* (1973) 30 Cal.App.3d 1009 [distinctions between drive in restaurants which had car hops and those which did not]; *San Antonio School District v. Rodrigues* (1973) 411 U.S. 1 [wealth not a suspect class and education not a fundamental interest; California law is to the contrary]; *Ladd v. SBE* (1973) 31 Cal.App.3d 35 [distinction permitted to avoid escaping tax on labor element]; *Dandridge v. Williams* (1970) 397 U.S. 471 [maximum ADC benefits]; *Associated Home Builders Inc. v. City of Newark* [higher license fee on the construction of homes than on commercial buildings]; *Zuckerman-Mandeville Inc. v. Sheffield* (1970) 8 Cal.App.3d 793 [excluding farm workers from unemployment compensation]; *Romero v. Hodgson* (1970) 319 F.Supp. 1201 [same]; *Lindsley v. National Carbonic Gas Co.* (1911) 220 U.S. 61 [discrimination permitted to prevent extinction of a state natural resource]; *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) 22 Cal.3d 208, upheld proposition 13 against a number of attacks, among them that the revaluation on sale provision violated the Equal Protection Clause.

In analyzing the holding in *Amador Valley*, one must remember that the question before the court was whether all of Proposition 13 should be thrown out. The main plaintiffs were subunits of the state which were protesting the cutback in their taxing powers. The California Supreme Court discussed the discrimination present in the revaluation on sale clause, but the issue was not properly before the court because no taxpayer had complied with the statutory claim procedure. The Court did not even discuss the possibility of striking the reassessment on sale part of the Proposition. In addition, the reassessment on sale provision has an equal burden on all people who move, not just those who move from out-of-state. *Western and Southern Life Insurance Company v. SBE* (1981) 451 U.S. 648, heavily relied upon by defendants, upheld a California statute which imposed a retaliatory tax against non-California insurance companies to the level that the company's home state would impose upon a California insurance company. The Court accepted the State's argument that the purpose was to promote interstate commerce by encouraging other states to lower their taxes against California companies.

258 Contrasted with the instant case, the State presented no evidence that any state other than California discriminates against vehicles originally sold in California. The effect of the VLF and use tax as interpreted by the DMV and SBE is to discriminate against interstate commerce, not to encourage it as in *Western and Southern Life*. The Court in *Western and Southern Life* emphasized that California's purpose was not to raise revenue, but *to promote competition*. The State admits here that the purpose of the VLF and use tax is to raise money and *to protect* California dealers *from competition*. Exhibit 90; R.T. p.28 l. 26 to p.30 l. 11.

259. Turning to the remaining cases cited by defendants, it becomes clear that these are equally inapplicable or deal with points not at issue in the within action. *Carmichael v. Southern Coal Co.* (1937) 301 U.S. 495, upheld an exemption of businesses with less than 8 employees from unemployment compensation because of the administrative convenience, i.e., difficulty in collection. These businesses were exempted, not charged a higher tax like here, where the State charged Woosley 213.5 times as much VLF and 250 times as much use tax as he would have paid on a California vehicle at that time. *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 1, found violations of the Equal Protection Clause because the distinctions were not reasonably related to the object of the legislation. *D'Amico v. Board of Medical Examiners* (1974) 11 C.3d 31, held to the same effect. *Roth Drug, Inc. v. Johnson* (1936) 13 Cal.App.2d 720, *City of Los Angeles v. Crenshaw Mortgage Company* (1975) 51 Cal.App.3d 696, and *Richfield Oil Corp. v. Franchise Tax Board* (1959) 169 Cal.App.2d 331, were cases of reasonable distinctions, but nowhere involving the disparate treatment at issue here. These cases had distinctions which were reasonable, considering the object of the legislation, as the difference fell along "natural" lines. *Allied Stores of Ohio v. Bowers* (1959) 358 U.S. 522, held that a state could *exempt* the property of nonresidents, distinguishing *Wheeling Steel v. Gander* (1949) 337 U.S. 562, cited in plaintiffs' brief, which struck down discrimination against an out-of-state concern. *Fleming v. Nestor* (1960) 363 U.S. 602, upheld a denial of Social Security benefits to a person who had been deported because he had been a Communist, straining to achieve that political object. *Burnet v. Wells* (1933) 289 U.S. 670, permitted a classification to stand in order to close a tax loophole, i.e., *so as to effect equal treatment*. *Schilb v. Keubel* (1971) 404 U.S. 357, dealt with public

policy reasons to reform bail procedures, recognizing that such social legislation is never perfect.

260. The instant case is quite different from *Halford v. Alexis* (1981) 126 Cal.App.3d 1022. In *Halford*, a methodology used by the DMV to switch from a calendar year registration system to a year round system was being challenged. Registrants were assigned dates throughout the year on which their registrations would expire in the future. To make the transition, different length registration years were assigned. The registration fee was prorated based upon the number of months in the period, but was not adjusted for the effects of the depreciation schedule. The inequalities not only were only $50 - $100 over a nine year period, but they were random. The classes were innocuous. A.G. p.106. There are no special equities for a class that is purely random in composition.

261. In the instant case the effects are not random, and the DMV's own records show that there was a massive deliberate discrimination against vehicles not originally sold by California dealers.

262. The *Halford* court distinguished *Haman v. County of Humboldt* (1972) 8 Cal.3d 922, 927, which found an impermissible discrimination.

263. The instant case is more like *Haman* than *Halford*. In *Halford* the makeup of the class was purely random and was a reasonable burden for the class to bear compared to the benefits received by the state as a whole. In *Haman* the class discriminated against was made up of California owners of boats documents out-of-state, and the taxes were 24 times as much as for boats documented in California. The court said that administrative convenience cannot justify discrimination of that magnitude. The cost of enforcement against out-of-state registered boats is a general cost of ad-

ministering the tax law and cannot be used to justify higher taxes on those who properly pay their taxes.

264. In the instant case the facts are even more favorable to plaintiffs than those in *Haman*. Besides the magnitude of the discrimination being greater, Haman could have moved the registration of his fishing boat. Plaintiffs cannot change the fact that their vehicles were not originally sold in California. Like race, national origin, and sex, this trait cannot be changed. It it is a stigma, it is a condition that cannot be erased. Plaintiffs are required to register their vehicles in California so there is not even the enforcement problem that there was in *Haman*.

265. As seen from the above review of the cases cited by the State, although many have language that suggests that no legislation would ever fail to satisfy the Equal Protection Clause, the holding tell a different story. Many of the cases found that State action violated the right of equal protection of the laws. While reasonable persons might differ on the results of a few of the decisions none offend one's sense of fairness.

266. Numerous cases demonstrate the impermissibility of discrimination based on residence. *Zobel v. Williams*, *supra*, held on various constitutional grounds that Alaska could not give graduated dividends to its citizens depending upon the length of time they had lived in Alaska. *WHYY, Inc. v. Borough of Greensboro* (1968) 393 U.S. 117, held that a state could not withhold a property tax exemption from a charitable organization because it was incorporated in another state, despite the government's argument that the provision served an administrative convenience of saving the state the burden of ascertaining that the corporation met the requirements of its home state. *Gilbert Associates v. Commonwealth* (1982 Penna. S.Ct.) 447 A.2d 944, held that Pennsylvania could not give Pennsylvania corporations the option of using either of two formulas to apportion in-

come, while affording foreign corporations no choice. *Blake v. McClung* (1898) 172 U.S. 239, held that Tennessee could not give its residents a preference over nonresidents in the liquidation of a company.

267. In analyzing equal protection cases there are some holdings that may not be explained by a strict application of either the strict scrutiny test, or the fair and substantial or "conventional" test, without more. The results reflect dissatisfaction with the black or white of these tests as they are often verbalized. This is also the reason that there are frequently numerous opinions in particular equal protection cases. It helps to reconcile the cases if one considers two factors -- the existence of special equities, and a recognition that the convenience to the state in making classifications can in some cases be outweighed by the inequities caused by the classifications.

268. One of the purposes of the equal protection principle is to protect unpopular classes from the excesses of majoritism. "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Louisville Gas v. Coleman* (1928) 277 U.S. 32, 37-38. It is popular to eliminate discrimination against certain classes, but the popularity of elimination of discrimination against others is not quite so widespread. The courts have clearly indicated that certain classifications are suspect -- race, national origin, religion, etc. The court has identified certain fundamental rights -- voting, privacy, travel, etc. However, there are a number of other classifications which have not risen to this level of popularity, yet the classes have special equities that deserve special consideration in light of the purpose of the principle. When these classes are involved, the courts add a little color to the stark black and white. One area where special equities are recognized is in the area of discrimination against women (under the

Federal Constitution). Another such family of classes are classes against which natural prejudices arise, such as newcomers, people who make purchases out of state rather than locally, etc. There are special equities any time that a class is underrepresented in the political process.

269. A factor that the court considers is the relative advantage to a state of classifications, compared to the disadvantage to those discriminated against. A reasonable level of discrimination against one class is the price we must pay in society for legislative and administrative bodies not being perfect, and for the overall benefits to each of us as members of society. The cases that have been upheld where administrative convenience provided the rational relationship fall into one of two categories. Most of the cases found the masses being discriminated against because others were given an exemption for administrative convenience. The extra revenue raised by closing the exemptions would be outweighed by the administrative cost, and the extra revenue collected by eliminating the exemption if used to reduce the burden on the masses would have an insignificant effect. An example of this is *Carmichael, supra.*

270. The other category of acceptable discrimination for administrative convenience is where the amount of the discrimination is minor in amount and imposed in a random or other equally innocuous way. Examples of this are *Halford*, the other classifications of the VLF system (i.e., VLF classes or automobiles vs. other vehicles), etc.

271. A third factor that explains some of the aberrations is that the courts recognize that the legislature cannot correct all ills at one time, and it must be allowed to solve problems one at a time. State action which is social and remedial is given a greater leeway than other legislation. Examples are *Zuckerman* and *Schilb*. Defendants herein readily admit that the legislation and practices in issue are purely to raise revenue, and not "social" legislation.

272. The instant case has special equities and does not fit the criteria for justification of discrimination based on administrative convenience. The special equities are the interstate nature of the transactions, underrepresentation in the political process, and the need to protect the class from excesses of majoritism. The burden of reducing administrative cost (if there is any) is not random and does not fall on the general population.

273. States have had the most difficult experience in upholding discrimination where the class being discriminated against is particularly underrepresented in the political process. *Kassel v. Consolidated Freightways Corp.* (1981) 450 U.S. 667, said, "Less deference to the legislative judgment is due when resident-favoring exceptions weaken the natural presumption that a state's own political processes will serve as a check against unduly burdensome regulations." This concept was also recognized in *Zobel v. Williams, supra.*

274. The principle of equal protection of the laws is more substantive under the California Constitution than under the Federal Constitution. *San Antonio etc. v. Rodrigues* (1973) 411 U.S. 1, 28, held that a school financing system based partly on property taxes did not violate the Federal principle, but *Serrano v. Priest* (1971) 5 Cal.3d 584, held that such a system violated the principle under the State Constitution. It is clear that the California Constitution requires the court to conduct a serious and genuine inquiry into the relationship between the classification and the goals. *Brown v. Merlo, supra; Cooper v. Bray, supra, Newland v. Board of Governors, supra.*

275. Applying the equal protection of the law principle to the license fee and the use tax, the Court concludes that the DMV, by interpretation of the statutes, has created a classification of vehicles not originally sold in California and subjects them to a higher license fee in several ways.

First, manufacturer installed options are excluded for California vehicles only. Second, the price paid by the first person to register a vehicle in California is used as the starting price for the VLF formula, rather than the price of the vehicle when it was new. Third, the depreciation schedule for non-California vehicles is begun with the date of purchase by the first person to register the vehicle in California rather than the year first sold as a new vehicle. In addition, the DMV imposed use tax calculated on actual purchase price of non-California vehicles, but used a favorable formula price on California vehicles until November 15, 1976.

276. Plaintiffs have shown that non-California vehicles are not a special burden upon the State. The State has argued that it would be an administrative burden to treat non-California vehicles the same as California vehicles. Even if this were true, and the evidence does not support it, the burden upon the class does not justify the convenience to the State. With its vast computer capacity, it would be very easy for the DMV to compile a list of makes, models and classifications of vehicles.

277. Regarding the use tax, the legislature determined that it was administratively preferable to use a price arrived at by formula to compute the automobile use tax. The DMV did not follow the directive of the legislature, and instead started requiring the use tax on out-of-state vehicles computed on purchase price. The large jump in revenue from the switch belies any argument that the reason for the change was for administrative convenience. The reason was to raise more money.

278. The object of the VLF legislation is to raise revenue. Exhibits 12 and 15. See, also, plaintiff's Interrogatories to Defendant DMV (Second Set), Interrogatory No. 183 and response thereto, Exhibit 91.

279. The classification of the VLF system which distinguishes between vehicles originally sold in the state and vehicles originally sold outside of the state is not reasonably related to the object of the legislation.

280. An Ohio statute taxed accounts receivable owned by nonresidents but did not tax accounts receivable owned by residents. The United States Supreme Court said that the statute on its face admitted discrimination against nonresidents and left no room to conceive of any other purpose for their existence. *Wheeling Steel Corporation v. Gander*, 337 U.S. 562, 69 S.Ct. 1291, 93 L.Ed. 1544 (1949). Discussing the case, Justice Brennan says that there is no conceivable rationale for a classification which discriminates against nonresidents *solely because they are nonresidents. Allied Stones of Ohio v. Bowers*, 358 U.S. 522, 79 S.Ct 437 (1959).

281. The same is true of a classification of persons or objects based on the fact that they were formerly nonresident. Differentiating between vehicles based upon whether they are purchased in-state or out-of-state has no substantial relation to the object of the legislation.

282. The object of the legislation is to tax vehicles for the use of the highways and to serve *in lieu* of a personal property tax. R&TC §10758; Exhibit 91.

283. A vehicle originally purchased outside of the state causes no more wear and tear on the highways, receives no more benefit from their use, and is not more valuable because it was purchased outside of the state. While it is true that there is more work in issuing a title to a vehicle which has previously been registered outside of the state, the DMV makes a separate charge for this (Veh.C. §9252), which is not an issue in this action. The additional effort has no relation to when and for how much the person purchased the vehicle. Further, the additional effort is in the

titling, not the licensing, and a vehicle can be titled in California without licensing it. See, DMV Manual, Exhibit 3.

284. In *Concordia Fire Insurance Company v. Illinois*, 292 U.S. 535, 78 L.Ed. 1411 (1934), the Supreme Court held that a statutory scheme which taxed a foreign insurance company on the *full value of its property* (as on out-of-state vehicles) while taxing other property in the state at *less than full value* (as on California vehicles) violated the Fourteenth Amendment.

285. In addition to failing the conventional equal protection test, the DMV's discrimination is also subject to the stricter test. The proper test to apply in this case is that of strict scrutiny, in which the burden is upon the State to show a compelling state interest to justify the discrimination. This is because owners of vehicles originally sold outside of California constitute a suspect class, and that fundamental interests are involved -- the right to engage in interstate commerce, and the right to travel. Classifying a vehicle as having been originally sold outside of California is a suspect classification.

286. Another way to describe a suspect classification is one that is based upon a constitutionally impermissible objective. *Shapiro v. Thompson, supra*, and *D'Amico v. Board of Medical Examiners, supra. Sully v. American National Bank*, 178 U.S. 289, 20 S.Ct. 935, 44 L.Ed. 1072 (1900), held that a creditor's preference for residents violated the equal protection clause. *Wheeling Steel Corporation v. Gander, supra*, held there was no conceivable rationale for a classification which discriminates against nonresidents because they are nonresidents. This case was decided before use of the terminology "suspect class" came into vogue, but the meaning appears to be the same. Ohio attempted to discriminate against *interstate commerce, a constitutionally protected class*.

287. *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982), is instructive as the most recent pronouncement on these issues. There, Alaska residents challenged a dividend program whereunder a yearly distribution would be made to all adult residents out of the state's mineral income fund. However, each adult resident received one dividend unit for each year of residency subsequent to 1959. Plaintiffs, residents since 1978, sued, claiming that they were being discriminated against in violation of the Fourteenth Amendment and their rights to migrate to Alaska. The United States Supreme Court agreed, holding that the distribution of benefits, when done unequally, subjects the distinctions to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The Court analyzed the reasons advanced by Alaska. Each of the reasons was to aid and benefit the residents of the state, ostensibly somewhat like the instant action where owners of California vehicles enjoy a benefit.

288. One of the questions raised by the Court in *Zobel* was if a state could condition benefits on length of residence. The Court concluded that this could not be done, yet California has done just that, giving resident vehicles (and their owners) a privileged status over persons, whether California residents or persons moving to California, no such privileges.

289. Four justices in *Zobel* concurring thought that "the pervasive discrimination embodied in the Alaska distribution scheme gives rise to constitutional concerns of somewhat larger proportions than may be evident on a cursory reading of the Court's opinion." For one thing, they, along with Justice O'Connor who wrote her own concurring opinion, saw a violation of the right to travel. 102 S.Ct. at 2316. When a "right to travel" is involved, this "will trigger intensified equal protection scrutiny." [Citations omitted.] This coincided with the Commerce clause analysis

earlier discussed and this reasoning was approved by the Supreme Court ("But equally plausible, I think, is the argument that the right [to travel] resides in the Commerce Clause. See *Edwards v. California*, 314 U.S. 160, 173 S.Ct. 164, 86 L.Ed. 119 (1941)..."). Since the "right to travel' is a "fundamental right", the "stricter scrutiny" requirement is applicable as noted in *Zobel*.

290. Notable is the recognition in *Zobel* that "to reward citizens for past contributions" is "clearly no a legitimate state purpose." California cannot then say that resident vehicles should pay les than nonresident vehicles because somehow this is in recognition of some past contribution by citizens living here or *buying the vehicle here so as to help the state economy*.

291. Justice O'Connor's separate opinion is also instructive. After discussing that "States must treat residents and nonresidents 'without unnecessary distinctions' when the nonresident seeks to 'engage in an essential activity or exercise a basic right', "she discusses the standards for testing constitutionality:

> "Once the Court ascertains that discrimination burdens an 'essential activity,' it will test the constitutionality of the discrimination under a two-part test. First, there must be 'something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed.' *Hicklin v. Orbeck*, 437 U.S. 518, 525-526, 98 S.Ct. 2482, 2487, 57 L.Ed.2d 397 (1978) (quoting *Toomer v. Witsell*, 334 U.S. 385, 398, 68 S.Ct. 1156, 1163, 92 L.Ed. 1460 (1948)). Second, the Court must find a 'substantial relationship' between the evil and discrimination practiced against the noncitizens. [Citation.]"

Holding that "fundamental" right, i.e., the right to travel and establish residency in a new state, was involved, she

concluded that Alaska's statute "burdens those nonresidents who choose to settle in the state."

292. In the instant case, what "evil" does California seek to redress by charging higher fees and taxes for those bringing vehicles into the state? There is none; and charging higher fees and taxes accomplishes nothing; there is no "compelling" reason to treat nonresident vehicles differently.

293. The right to move from state to state is one that cannot be barred *or* impinged upon.

294. California's disparate treatment impairs that right, whether a new resident is seeking to license, register or title his vehicle, or a California resident wants to do business in another state but must pay a higher price for exercising his right to do so.

295. Both the way the DMV presently computes VLF and the way that it computed use tax prior to November 15, 1976, causes resident and nonresident vehicle to be put into separate discriminatory classifications for which there is no compelling state reason, and they bear no reasonable relationship to the object of the legislation. Accordingly, the classifications violate the Equal Protection Clause.

IF THE DMV'S APPLICATION OF §6276 AND §10753 WAS AND IS REQUIRED BY THE LANGUAGE OF THE STATUTES, THE STATUTES ARE UNCONSTITUTIONAL.

296. It is the DMV's and SBE's interpretation of §6276 and §10753 that resulted in the unconstitutional application of those statutes in the assessment of vehicle license fees from 1967 to date, and i the assessment of use taxes from 1967 to November 15, 1976.

297. However, if the interpretation of the DMV is required by the statutes, and disparate tax and license fee

treatment of California and out-of-state vehicles is mandated by the law, then based upon the authorities cited hereinabove, the Court finds that these statutes are unconstitutional.

THE CHANGE IN PRACTICE TO REQUIRE A CERTIFICATE OF COST FOR ALL VEHICLES FOR COMPUTATION OF THE USE TAX AS INSTITUTED BY THE 1967 INTER-AGENCY AGREEMENT WAS AN INVALID ATTEMPT TO CREATE A REGULATION.

298. The Court is convinced that based on this record, Plaintiffs may properly challenge the 1976 Interagency Agreement. Further, the plaintiffs have shown its invalidity as an interpretation of §6276.

299. Defendants' argue that the 1976 Interagency Agreement, which they contend permit the assessment of use tax on a cost basis, it is not a regulation and is valid.

300. Defendants contend the agreement is not a regulation because no quasi-legislative power is exercised (a curious position since DMV has steadfastly said that it is an exercise of legislative power) and that it validly construes 6276.

301. The DMV's position is that a vehicle which was originally sold outside California does not have a "California suggested base price," and therefore its market value must be determined on the basis of the cost price to the purchaser. Stipulated Facts, No. 29, 30.

302. The DMV's practice was also to start the depreciation schedule for an out-of-state vehicle when purchased by the first person to register it in California.

303. As noted, no statute requires or sanctions such positions or practices. No duly promulgated regulations provide for these positions or practices either.

304. California has a carefully proscribed method of promulgating regulations. See, Government Code Sections 11421 *et seq.*

305. These procedures were not followed either in 1967 when the DMV began requiring purchasers of nonresident vehicles to pay VLF and Use Tax based on cost, nor were they followed in 1976 when the DMV and SBE agreed to change the practice and require *all* vehicle purchasers to pay use tax based on "cost."

306. The 1976 Interagency Agreement is a regulation and subject to the California Administrative Procedure Act.

307. The Administrative Procedures Act (Government Code Section 11340 *et seq.*) defines "Regulation" in Section 11342(b) (formerly Government Code Section 11371) as follows:

> "'Regulation' means every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to *implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure*, except one which relates only to the internal management of the state agency..." (Emphasis added.)

308. The 1976 Interagency Agreement (Exhibit 79) is not only a regulation as defined in the Government Code, but is an attempted total revision of R&TC §6276.

309. The Interagency Agreement not only interprets R&TC 6276 but implements procedures for collection of the use tax. Defendants' reference to the Interagency Agreement provides no support for their actions.[11] The In-

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11. The agreement is a "private" agreement between DMV and SBE. There were no hearings public comments permitted. R.T. p. 49 l. 20 to p. 50 l. 5, Mr. Cary testimony and 8 to p. 60 l. 13, Mr. Fiorino's

teragency Agreement is relied upon by defendants to show the propriety of their actions, but that is simply a bootstrap approach. If the interpretation or application is wrong, an agreement between the defendants approving it is of no relevance whatever.

310. The Administrative Procedures Act as well as public policy require public hearing and/or comment in the adoption or change or regulations. There were no public hearings as to the 1976 Interagency Agreement.

311. Government Code Section 11346.8 (formerly 11425) provides the procedures for public hearing and/or comment necessary under the APA.

312. The two main objectives of the APA (Government Code Sections 11371-11427) were to assure meaningful public participation in the adoption of administrative regulations and judicial review. *California Optometric Ass'n. v. Lackner* (1976) Cal.App.3d 500.

313. Private negotiations with selected members or representatives of an affected industry are no substitute for public hearings. *California Ass'n. of Nursing Home, Inc. v. Williams* (1970) 4 Cal.App.3d 800. Neither, it is safe to presume, are private negotiations between state agencies.

314. Defendants' protestations to the contrary, the APA was designed to provide a remedy for those in the position of the plaintiffs. The plaintiffs do not object to the legality of the tax, but to the method by which the tax is computed and to the way in which the method came to be administered.

(of SBE) testimony. "[A] law established for a public reason cannot be contravened by a private agreement." Civil Code §3513; *Terry v. Bender* (1956) 143 Cal.App.2d 198.

315. The whole rationale behind administrative hearings and public testimony is that interested parties and groups will have an opportunity to present their views to the agency on a proposed regulation change.

316. In regard to the use tax, the new method of collecting the use tax allegedly was going to raise a estimate additional $20 million for the state of California. Obviously, this is not a small amount of money and the taxpayers who pay the use tax are entitled through their representatives to present their view on such a radical change. However, the DMV and the SBE avoided any public review of their proposed methodology by not holding any public hearings.

317. The new method of use tax collection in contradiction to R&TC §6276 and §1610 of the Administrative Code, Title 18, is in effect a substantial tax increase for California taxpayers.

318. The Interagency Agreement falls within the grounds for invalidity as provided in the Administrative Procedures Act.

319. Government Code 11350 provides the vehicle for judicial declaration as to the validity of regulations. The section states in part:

> "(a) Any interested person may obtain a judicial declaration as to the validity of any regulations by bringing an action for declaratory relief in the Superior Court in accordance with the provisions of the Code of Civil Procedure. The right to judicial determination shall not be affected by the failure to seek reconsideration of a petition filed pursuant to Section 11347.1 before the agency promulgating the regulations. *The regulation may be declared invalid for a substantial failure to comply with the provisions of this chapter*, or, in the case of an emergency

regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1." (Emphasis added.)

320. Defendants failed to comply with the procedural requirements of the APA in the creation of the Interagency agreement.

321. The creation of the Interagency Agreement was an exercise of quasi-legislative power and therefore subject to the Administrative Procedure Act.

322. In the present case, R&TC 7051 specifically provides that the SBE "shall enforce the provisions of this part and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this part."

323. Section 7051 therefore specifically grants to the SBE quasi-legislative authority to implement the Sales and use Tax provisions of the Revenue and Taxation Code, and such authority is accompanied with the positive injunction to comply with the procedural requirements of the APA.

324. Defendants argue that the creation of the Interagency Agreement was merely an administrative construction of R&TC §6276 and therefore not subject to the procedural requirements of the APA. This argument is without merit. As has already been stated above, the legislature has defined "regulations" subject to the APA procedures as "every rule", regulation, order, or standard... adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure ... Govt. C. §11342.

325. It is quite obvious from a reading of the Inter-Agency Agreement that the purpose of the agreement was to implement and interpret R&TC §6276 out of the law and increase taxes.

326. The agreement, however, went quite beyond implementing and interpreting the statute and effectually re-legislated the tax section.

327. Defendants' 1976 Interagency Agreement effectively re-legislates Revenue and Taxation Code Section 6276 and is invalid and ineffective.

328. Government Code Section 11342.2 provides:

> "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation is valid or effective unless consistent and not in conflict with the Statute and reasonably necessary to effectuate the purpose of the statute."

329. An analysis of the Interagency Agreement of November 1976 indicates that revised method of use tax collection, totally contrary to the provisions of Revenue and Taxation Code Section 6276, was instituted unilaterally by the defendants.

330. R&TC 6276 provides:

> "(a) Except when a vehicle is purchased outside this state from the manufacturer or from a vehicle dealer, whenever the purchaser of a vehicle is required to pay the use tax to the Department of Housing and Community Vehicles, *the sales price shall be presumed to be an amount equal to the market value of the vehicle at the time of the purchase as that value is determined to measure vehicle license fee imposed under part 5 commencing with Section 10701) of Divisions 2*, multiplied by a factor of 1.2 for a non-commercial vehicle, including a passenger vehicle as defined in 465 of the Vehicle Code or by a factor of 1.8 for a commercial vehicle as defined in Section 260 of the Vehicle Code." (b) commercial motor ve-

> hicles under 6,001 pounds unladen weight and commercial trailers made 2,000 pounds unladen weight shall be treated as non-commercial vehicles for the purpose of this section. *The presumption may be rebutted by evidence which establishes that the sales price was other than that amount.*" (Emphasis added.)

See, also, California Administrative Code, Title 18, Section 1610 (c), in which the use tax provisions of R&TC §6276(c), in which the use tax provisions of R&TC §6276 are restated.

331. Intentionally omitted.

332. The Interagency Agreement effectively relegislates Section 6276 by removing the presumption and requiring use tax on the actual sales price of the vehicle.

333. The agency obtains the "actual sales price" by requiring the purchaser to sign a declaration as to what he paid for the vehicle, an approach rejected by the legislature. The purchasers' failure or refusal to sign such declarations results in the DMV refusing to register the vehicle.

334. To exact from the purchaser of a vehicle the evidence with which to rebut the presumption created for this favor and convenience is not only unfair but contrary to general principles of evidence relating to burdens of proof. See, generally, Ev.C. 600, *et seq*. Obviously, if the State wishes to rebut the presumption and show the sales price is greater than the chart valuation, the burden is upon the State to produce that evidence. Placing the burden of proof on the State is meaningless, if the DMV can demand a cost certificate.

335. The DMV has no right to require the production of a certificate of purchase price. In every other case where a person is required to supply information to the State under penalty of perjury there is a statutory basis. Here there is none. A person paying use tax to the DMV is not required

to file a return. R&TC 6292(c). If a return were required it would not need to be verified. R&TC 6452. Yet, the certificate of purchases price constitutes a return, which is not required by the statute.

336. The cost information contained in the form is information that has been acquired illegally, information which has been exacted by the DMV's threat no to title, license, and register the vehicle. This evidence cannot be used to rebut the assumption.

337. Assuming, for the sake of argument, that the DMV or SBE can present evidence in a particular case to establish the sales price, that does not justify the DMV requiring a certificate or bill of sale in all cases.

338. This requirement deprives the taxpayer the administrative protections afforded him by the Legislature.

339. Prior to the 1976 change, an audit challenge to the presumption almost never occurred unless the documents presented for registration indicated a purchase price.

THE CLAIMS ARE SUFFICIENTLY SPECIFIC

340. Defendants contend that the claim filed with the SBE does not meet the specificity requirement of R&TC §6904 and that plaintiffs' action, therefore, cannot challenge the constitutionality or validity of the statutes in question.

341. The State's position is unsound. The various claims were very specific. See, Exhibit 1.

342. The SBE argues that the claim's use of the word "practice" forecloses constitutional attack on the statute itself.

343. The use of the "practice" in the context of the claim is broad.

344. Besides attaching the statutory interpretations, the claim attacks the discrimination, whether caused by a misinterpretation or by an unconstitutional statute.

345. Plaintiffs' claim contends that the SBE/DMV interpretation violates the constitutions of California and the United States. Alternatively, plaintiffs claim that the statute is unconstitutional.

346. The plaintiffs' claim itself gave the SBE clear and concise notice of the statutes and the interpretations challenged.

347. The claim clearly notified defendants that it was the disparate treatment of out-of-state vehicles and the interpretation of §6276 that was being challenged.

348. The claim and its attachments even provided some of the legal theories to support the claim -- violation of the Interstate Commerce Clause and an improper interpretation of the statute.

349. There is no legal requirement that all of the legal theories be set forth in the claim. *San Jose v. Superior Court, supra.*

350. A claim that a practice violates a constitutional prohibition is broad enough to challenge the statute itself if the statute requires the unconstitutional action.

351. The only case cited by defendants which is anywhere near relevant to this issue is *King v. SBE* (1972) 22 Cal.App.3d 1006, in which the taxpayer raised an issue of the statute of limitations for the first time in Court. In that case the SBE had not had the opportunity of ruling on the limitations question. Failure to raise a statute of limitations, a procedural barrier, is deemed a waiver of the statute. *Minton v. Cavaney* (1961) 56 Cal.2d 576. No such rule applies to substantive challenges, where the ultimate fact of violation of law is charged and where specific

references to statutes are, in fact, prohibited as conclusions of law. See, 3 Witkin, *California Procedure*, 2nd ed., Pleading, 292, pp. 1944-6. Here, the SBE had the opportunity to rule and did rule on the interpretation and discrimination.

352. The issue of the proper interpretation of 6276 is properly before the Court.

WHEN THE APPLICATION OF A TAX DOES NOT AGREE WITH THE STATUTE OR THE REGULATION, OR VIOLATES THE CONSTITUTION, THE AGGRIEVED TAXPAYER IS ENTITLED TO A REFUND WHICH CORRECTS ANY OVERPAYMENT HE HAS MAKE.

353. The universal way of correcting discrimination against interstate commerce has been to make a refund to the taxpayer being discriminated against, or otherwise extend to the taxpayer the benefits or advantage given to others. In hundreds of cases on interstate commerce, the courts have eliminated the discrimination by *improving* the position of the taxpayer discriminated against, and have not thought any other conclusion worth discussing.

354. Plaintiff must prove not only that the assessment being challenged is wrong, but must also prove sufficient facts upon which a correct assessment could be made.

355. This simply means that a party cannot avoid all of the tax by showing that some portion of the amount assessed is not correct. See, *People v. Schwartz* (1947) 31 Cal.2d 59; *Sunshine Art Studies v. SBE* (1947) 39 Cal.App.3d 223; *Flying Tiger Line v. SBE* (1958) 157 Cal.App.2d 85; and, *L.A.J., Inc. v. SBE* (1974) 38 Cal.App.3d 549.

356. Representative plaintiff has affirmatively established a right to refund by proving the correct assessment.

357. The uncontroverted testimony is that plaintiff Woosley would have paid a Vehicle License Fee of $2 rather than $427, and a use tax of $6 rather than $1,500, had he not been discriminated against. (R.T. p.8 1. 24 to p.9 1. 20.)

358. The elements of plaintiffs' burden have been satisfied. The defendants introduced no contrary evidence.

359. Further, the State cannot use the refund mechanism to place a burden upon the taxpayer which denies his constitutional right to nondiscriminatory taxation. The courts have not accepted that a taxpayer who has a right can be denied a remedy.

360. The Courts have gone to considerable lengths to avoid denying remedies to taxpayers. A case in point is *Javor v. SBE* (1974) 12 Cal.3d 790 which involved sales taxes, which are imposed upon dealers, rather than upon their customers. Dealers have a right to collect a sales tax reimbursement from their customers. The State maintained that only the dealers can sue for a refund, and that if a refund were made, it must be to the customers. Therefore, few dealers were willing to dispute the position of the SBE if the tax has been funded by their customers. In *Javor* the Supreme Court allowed plaintiffs, the customers, to bring a class action and to make all automobile dealers class defendants along with the SBE so that the buyers could have a remedy.

361. In *Apartment And Office Building Owner's Association v. District of Columbia* (D.C.D.C. 1979) 106 Wash. Law Reporter 2097, CCH, Dist. of Columbia, 200-265, the court found an exception to a statute which prohibited injunctions against the collection of taxes. The court found that the taxing jurisdiction was illegally collecting the tax early, even though the amount of the tax was correct. The court found that since the tax refund mechanism did not

provide any remedy for a situation where the correct amount of tax was being collected, but before it was due, an injunction would issue to provide plaintiff a remedy.

362. In the instant case the evidence is overwhelming that nonresident vehicles are having their VLF computed incorrectly. The legislature was asked by the DMV to authorize the basing of all VLF calculations on cost and it refused.

363. Providing refunds to those who have overpaid license fees and use tax based on cost is the proper remedy to effectuate the legislative intent.

364. In the instant case where the treatment of California vehicles was proper (as to the use tax only pre-November 15, 1976) and the treatment of out-of-state vehicles was improper, the discrimination can be eliminated by making refunds to the relatively small portion of taxpayers who incorrectly have paid too much tax.

365. The Revenue and Tax Code provides that refund is the proper remedy:

> "Whenever the Department [of Motor Vehicles erroneously collects any license fee not required to be paid under this part, the amount shall be refunded to the person paying it . . ." R&TC 10901. See, also, 6901.

366. In the case of the California VLF this should be accomplished by (1) determining the VLF classifications of automobiles listed in the Vehicle License Fee Rate Book from the information contained therein so that vehicles prior to the 1968 model year are rated the same whether they were sold new in California or not, (2) determining the VLF classification for 1968 and later model autos, from whatever evidence there is available as to the suggested based price as defined in Section 10753(h), and commenc-

ing the depreciation schedule with the date of purchase of the vehicle as a new vehicle, whether in California or not.

367. Use tax should be recomputed on the basis of section 6276, and any excess paid must be refunded.

VEHICLES OTHER THAN PASSENGER MOTOR VEHICLES

368. The Vehicle License Fee applies to all vehicles to a type subject to registration. R&TC §10751.

369. The Vehicle code defines "vehicles" as a device by which any person or property may be propelled, moved, or drawn upon a highway except solely by human power. Veh.C. §670.

370. The Vehicle Code defines "motor vehicle" as a self propelled vehicle. Veh.C. §415.

371. The Vehicle Code defines "commercial vehicle" as a vehicle required to be registered which is used or maintained to transport persons for hire, compensation, or profit, or designed, used or maintained for the transport of property.

372. In addition to passenger motor vehicles, a registration fee is imposed upon trailers, semi trailers, trucks, truck tractors, motorcycles, trailer coaches, buses and the following types of dollys: auxiliary, pole, pipe, and logging. Veh.C. §4000.[12]

373. Prior to late 1967, the "starting price" of nonautos (except commercial vehicles the delivery price of which did not include a body or other essential part), was the "delivered price", just as it was for passenger motor vehi-

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12. For convenience, the term "nonauto" is used herein to designate any vehicle subject to the Vehicle License Fee which is not a passenger motor vehicle as defined by Veh.C. Sec. 465.

cles. R&TC §10753 before modification by Stats 1967 ch 435 sec. 2; Exhibit 43.

374. The market value of nonautos originally sold new in California after September 1, 1967 is and was based upon the price paid by the first consumer since there is no federal price sticker required. Sec. §10753(b); Exhibits 18, 39 page 2, 42 sec. 35.010(2), 87(2).

375. The market value of all nonautos are assigned to VLF classes in the same manner as passenger motor vehicles. Sec. 10753.2.; Exhibit 42 sec. 35.100.

376. The mid-point of the classes assigned to nonautos are assigned a factor based on age in the same manner that the factor for autos is assigned, except that the depreciation table for mobile homes which are required to be moved under permit contains 18 years rather than 9 years of depreciation. Sec. 10753.2(e).

377. When a nonauto which was originally sold outside of California is first registered in California after September 1, 1967, the DMV assigns a price class and year based on the date and price of purchase by the first person to register the vehicle in California, even if he is not the original owner. The DMV charges the Vehicle License Fee on this " market value". Sec. 10752 and 10752.1. Exhibits 42 sec. 35.010(4), 87 sec 3.

378. Just as with passenger motor vehicles, the VLF classification for non-autos is not changed due to a change of ownership. Exhibits 42 sect. 35.100, 35.113, Exhibit 57, 56 page 5.

379. The VLF classifications of nonautos which were registered in California prior to 1967 did not have their VLF classifications changed as a result of the 1967 legislation. Exhibit 43, page 7.

380. The 1967 change caused substantially more VLF to be collected for light commercial vehicles. Exh. 56, p. 3 (5).

381. The higher fees continue during subsequent owners. Exhibit 56, p. 5.

382. Before late 1967, the presumption of Sec. 6276 was accepted by the DMV (except in cases where a document necessary to establish the chain of ownership contradicted the presumption) for auto and non autos alike, irrespective of their place of original sale or last registration. Sect. 6276, Exhibit 18.

383. Operative January 1, 1972, Section 6276 was amended to insert a 1.2 factor for autos, commercial vehicles under 6001 pounds unladen weight and trailers under 2,000 pounds. The factor for other commercial vehicles became 1.8. Stats 1971 ch 1741 sec. 1.

384. Substantially more use tax is paid on trucks and trailers under the cost method than under the chart method. Exhibit 86, last page.

385. The DMV started collecting use tax for all vehicles, including mobile homes, based on cost starting November 15, 1976. Exhibit 89.

386. Prior to November 15, 1976 private California sellers had a competitive advantage over dealers and sellers of non California vehicles including mobile homes. Exh. 90 p. 12-13.

CONCLUSION

For the reasons, and based upon the authorities, set forth above, the Court hereby determines the issue of liability in favor of plaintiff Charles Patrick Woosley, on behalf of himself and all similarly situated persons, and against the State of California, the Department of Motor Vehicles, the

State Board of Equalization and the Board of Control, as prayed for in the Complaint, and further orders that a refund be made of all unlawfully assessed license fees and use taxes.

Dated: December 27, 1983.

/S/ Lester E. Olson
Lester E. Olson
Judge of the Superior Court

APPENDIX E

ENTERED November 13, 1984

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CHARLES PATRICK WOOSLEY, individually and on behalf of all others similarly situated Plaintiffs, vs. STATE OF CALIFORNIA, et al. Defendants.	No. CA 000499 STATEMENT OF DECISION GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

This matter came before the Court on the motion of plaintiff, Patrick Woosley, for an order certifying this action as a class action. This action seeks recovery of illegally assessed vehicle license fees and use taxes, both on an individual and class bases. Pursuant to a stipulation between the parties, liability issues were bifurcated from class issues and liability issues were tried first. Trial of all liability issues has been completed, and in December, 1983 this Court entered its Statement of Decision finding in favor of plaintiff and against defendants on all issues. Since the decision on the merits, class action discovery was undertaken, plaintiff's motion for certification was filed, extensive briefing was submitted and evidentially hearings and

argument were presented over a two-day period on July 10 and July 11, 1984.[1]

Based upon (1) the factual findings and the legal conclusions of this Court's Statement of Decision of December 1983, (2) the evidentiary matters submitted to this Court in support of, and in opposition to, plaintiff's motion for class certification, and (3) the legal authorities which guide the exercise of this Court's broad discretion in granting or denying class certification, this Court finds that plaintiff has proved, by a preponderance of the evidence, that this action should be certified as a class action.

The Court's determination on class certification is governed by the Los Angeles County Superior Court "Manual For The conduct of Pretrial Proceedings In Class Actions," (the "Manual").

Section 427 of the Manual details the matters that should be addressed by the parties on the five principal class certification issues.[2]

The Manual provides:

> "This manual sets out the policy of the Los Angeles Superior Court for the scheduling and conduct of

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1. No showing has been made that circumstances are present to justify reexamination of issues already decided. Thus, Defendants' rearguing of the issues of exhaustion of administrative remedies, equal protection and other points previously ruled on are not reconsidered herein.

2. The Court's December 1983 Statement of Decisions will be referred to as "S.D. par. __." The transcript of the Class Certification hearing will be referred to as "CCH __." Defendants' opposition papers will be referred to as "D.O.___." The trial transcript will be referred to as "R.T.__."

pretrial proceedings which will be held in every class action to determine class issues.

"This manual defines and catalogs those issues (herein designated `issues') which are unique to class actions, which are present in each said action, and which are subject to pretrial determination. These issues are:

1. Constitution of the class.

2. Common, similar and unique questions of law and fact.

3. Superiority of the class action to other available methods for the fair and efficient adjudication of the controversy.

4. Membership of the class representative in the class.

5. Ability of the class representative to fairly and adequately protect the interest of the class.

6. Necessity for and content of notice."

The Manual recommends that issue number 6, necessity for and content of notice, not be dealt with until the Court has determined issues 1 through 5 above. Accordingly, the parties have not addressed, and the Court makes no determination at this time, on the necessity for and content of notice.

POLICY CONSIDERATIONS

There is a preliminary issue that the Court feels compelled to consider. That issue is whether as a matter of public policy the benefits outweigh the burdens of the certification of a large taxpayers class action against public agencies involving refunds of millions of dollars of taxpayer's money out of the general treasury of the State.

First, it is clear from prior cases that governmental entities are not exempt from class actions. Nor is there any indication that the courts have given governmental defendants in class actions any special treatment.

Indeed, the California Constitution , Article III, Section 5 provides: "Suit may be brought against the state in such manner and in such courts as shall be directed by law."

Code of Civil Procedure Section 382, on which class actions are based, provides no exception for governmental entities.

There are numerous authorities on the availability of the class action procedure in actions against government entities. In *California Employment Development Dept. v Superior Court* (1982) 30 Cal.3d 256, 178 Cal.Rptr. 612, 626 P.2d 575, defendant argued that class recovery was not justified because of the administrative burdens of identifying and providing relief to the members. The court distinguished *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 134 Cal.Rptr. 393, 556 P.2d 775, and said:

> Over the past decade ... many cases have recognized that a class action is a "particularly appropriate" vehicle for providing relief when, as here, a large number of applicants are recipients have been improperly denied governmental benefits on the basis of an invalid regulation, statute or administrative practice. [Citations] 30 Cal.3d 256, 265.

In *Lowry v. Obledo* (1980) 111 Cal. App.3d 14, 26-27, 169 Cal.Rptr. 732, a case against the State, the court said:

> Here the plaintiff class has established its rights to recover benefits withheld from its members solely on the basis of an invalid regulation. The trial court's certification of the class for purposes of declaratory relief only, allows a failure of justice inasmuch as it deprives the class of a means by which to enforce its

> right. It also does not serve the purposes of necessity and convenience to the parties and the court. Instead, it invites each class member to individually bring sit to enforce his right ... *[W]e hold that the failure to define the class under the circumstances of this Case so as to provide for the payment of such benefits is an abuse of discretion.* [citation]. (Emphasis added.)

Attempts by governmental defendants to avoid class action certification based on the argument that the objective of correcting the illegal practice could have been accomplished in another way have been dismissed.

In *Miller v. Woods, as Director* (1983) 148 Cal.App. 862, 872. 196 Cal.Rptr. 69, the agency argued that a class action was not appropriate because an individual action would have determined the issue, causing the agency to change its rule. The court rejected the contention that there was no justification for class certification, saying that the theory was novel and had no lawful basis. The court pointed out that without a class action the class members could not obtain relief.

In *Rose v. City of Howard* (1981) 126 Cal.App.3d 926, 179 Cal.Rptr. 287, a class action by a municipal employee against the municipality over the computation of pension benefits, defendant argued that an individual action rather than a class action would bring the same result. Reasoning that the expense of bringing an individual action far exceeded any individual's prospective recovery, the court said:

> We see no basis in law or equity for making a sacrificial lamb of [named plaintiff] or any other individual class member on behalf of the other 41 class members. The course respondents suggest may effectively discourage the issue from being adjudicated. We cannot permit such an inequity when the very

> purpose of class actions is to open a practical avenue of redress to litigants who would otherwise find no effective recourse for the vindication of their legal rights. 126 Cal.App.3d at 935.

Second, class action procedural rules do not change the substantive rights of the parties. *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 130. 179 Cal.Rptr. 342.

Class members have paid excess taxes. R&TC Section 10901 requires that excess Vehicle License Fees collected from class member be refunded. There is no reason to treat excess use taxes any differently.

California cases have uniformly held that classes are properly certified for refunds of taxes when a class claim has been filed and the action meets the usual certification criteria. Among the cases in which certification has been granted are *Santa Barbara Optical V SBE* (1975) 47 Cal.App.3d 244. 120 Cal.Rptr. 609 [sales taxes paid by opticians]: *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 117 Cal.Rptr. 305. 527 P.2d 1153 [sales taxes Paid on refunded federal import taxes]: and *Mann v. County of Alameda* (1978) 85 Cal.App.3d 505. 149 Cal.Rptr. 552 [property taxes on students' possessory interest in university housing].

There are also a number of California tax cases in which the courts have recognized that class actions would have been proper if the claims procedures had been followed (as it was here.) Examples are *Schoederbek v. Carlson* (1980) 113 Cal.App.3d 1029. 170 Cal.Rptr. 400: and. *Lattin v. Franchise Tax Board.* (1977) 75 Cal.App.3d 377, 142 Cal.Rptr 130. In other cases, plaintiffs ave been lost on the merits such as *Halford v. Alexis* (1981) 126 Cal.App.3d 1022, 179 Cal.Rptr. 486, but the courts have upheld the propriety of the class action approach.

California is not alone in certifying class actions for refund of taxes. Among the cases holding tax refund class actions proper are *Whaley v. Commonwealth* (1901) 110 Ky. 154, 61 S.W. 35 [property taxes] and several other Kentucky cases relying thereon: *Ware v. Idaho State Tax Commission* (1977) 98 Idaho 477. 567 P.2d 423 [sales taxes paid on grocery items]; *Fiorito v. Jones* (1968) 39 Ill.2d 531, 236 N.E.2d 698. later appeal 45 Ill.2d 256, 278 N.E. 833. and later appeal 48 Ill.2d 566. 272 N.E.2d 41 [sales taxes on services]; *Cohon v. Oscar L. Paris Co.* (1958) 17 III. App.2d 21. 149 N.E.2d 472 [sales tax on carpet installation]; *Thorne v. Jefferson County* (1979, Ala.) 375 So.2d 780 [property taxes]: *Clark v. Lee* (1980. Ind.) 406 N.E.2d 646 [local income taxes]: and *Friar v. Vanguard Holding Corp.* (1980. 2d Dept.) 78 App.Div.2d 83, 434 N.Y.S.2d 698 [mortgage recording tax].

Third, there are sound policy reasons to allow class actions against taxing authorities. Ours is a system of government based upon the rule of law. If officials are not required to follow the law, our system of government breaks down. Government officials cannot be above the law, for in order to properly function our system depends on principles of responsibility and accountability.

The class action device recognizes and remedies the temptation to overcharge many people a small amount where there is no effective way for the victims to correct the abuse.

Given the nature of our political Process. and the ever expanding executive role of a professional civil service bureaucracy, public agencies may in fact be far more shielded from responsibility and accountability for unlawful acts that either the private sector or the elected branches of government.

Many times, illegal action by a private defendant can be defended against by doing business with other entities. or in the case of individual wrong doing, by discharge.

The classes herein cannot take their business elsewhere. They cannot start a competing tax collection agency. There is no personal responsibility or accountability in the tax collection context that would lead to the termination of civil servants.

With respect to the wrongdoing of elected officials, the ballot box can be a powerful tool. It is not realistically available to remedy the wrongful practices of agencies consciously ignoring the requirements of duly enacted legislation. Bureaucrats are basically immune from the ballot box. Defeating illegal tax overcharges at the ballot box would be using an axe where a scalpel is called for. One does not defeat elected officials because of the wrongs of civil service officials.

Further. the victims of Commerce Clause discrimination have little or no say at the polls. Undoubtedly many members of the discrimination class are new residents who have exercised their constitutional right to move to California. They, as well as the remaining members of the class are underrepresented in the political process. Further, the out-of-state sellers of non-resident Vehicles whose products are rendered less competitive by the discriminatory tax have no representation whatsoever in the political California process.

There is evidence in this case that could support an argument that the one reason why the defendants in this action persisted with their discriminatory taxing procedures long after defendants own internal studies had demonstrated and acknowledged the gross inequality of those procedure was because the defendant agencies felt immune from re-

sponsibility and accountability to out-of-state and underrepresented interests.

The courts have said time and again that states cannot discriminate agains t out-of-state interests. Despite the Court's ruling, Defendants continue to discriminate against interstate commerce and continue to ignore the presumption of R&TC Section 6276.

Public agencies are virtually immune from the typical nonjudicial remedies available to individuals victimized by either the private sector or elected officials. To deny the judicial remedy provided by the class action vehicle to victims of public agency wrongdoing or ineptitude would further insulate those agencies from responsibility and accountability. Public policy would not be served by such a result.

There have been several United States Supreme Court cases this term that further reinforce this Court's holding against discrimination against interstate commerce. See *Bacchus Imports Inc. v. Diaz* (1984) No. 82-1565, __ U.S. __; *Armco Steel v. Hardesy* (1984) No. 83-27, __ U.S. __; *Westinghouse Electric Company v. Tully* (1984) __ U.S. __, 80 L.Ed.2d 388, 104 S.Ct.__.

Refunding taxes herein may well serve to discourage other state officials from violating the law. It is not contrary to public policy to impose the burden of refunding illegally collected taxes on the State on the theory that the burden would be borne by the population as a whole and would serve no therapeutic effect.

An illegally collected tax is just as much an obligation of the state as a bond or note. The state cannot repudiate a debt on the excuse that it is owed to its citizens.

The modern view is to view government as a separate entity distinct form those which it governs, even though those governed eventually pay the bills. This principle is

reflected in a number of ways. Tort and contract immunities have essentially disappeared. The relationship of the population to the government is analogous to the relationship of share holders to Publicly held corporations. Theoretically, the population in the case of government. and the shareholders in the case of corporations, reap the financial benefits and bear the burdens of the actions of the entities. However, the entities have their own life, ability to contract, and are treated as separate for tax purposes. Corporations are not from either shareholder or other class actions which would cause them to pay back money illegally obtained on arguments that the shareholders would either be simply paying themselves or because innocent shareholders would be the ones who would suffer.

Further, it is far from clear that either corporations or governments can or do pass on such burdens.

The assumption that the state can pass on the effects of having to repay the illegal collected taxes also erroneously assumes that the state can extract from its citizens an unlimited amount of money. The taxpayers of the state do not view the money of the state as being synonymous with that of the taxpayers. Propositions 13 and 24 illustrate this.

Having to pay back money that is owed due to illegal collections, and that the law says must be paid back, is not a penalty. It is a debt. Having to make refunds may well cause embarrassment to the officials and employees who engineered, implemented and perpetuated the illegal schemes. The refund may attract the attention of other governmental officials and cause them to think twice before ignoring or violating the law.

The example of this and similar cases may give those in the government who seek to follow the spirit and letter of the law an extra weapon to use against those who do not. Had there been a previous class action recovery against one

of the State's tax collecting agency, the Department of Motor Vehicles ("DMV") may well have prevailed when the State Board of Equalization ("SBE") pressured it to ignore Section 6276. Similarly, those in the DMV who recognized that the discrimination against interstate commerce was wrong may well have succeeded in correcting the discrimination.

It is costly on the courts, the claimants, and the tax collecting agencies to repeatedly litigate actions in which interstate commerce has been discriminated against. The law is settled that states and their instrumentalities cannot discriminate against interstate commerce.

It is contrary to public policy to allow government officials to get away with violating the law. It may tend to encourage a lack of respect for the law both by those being governed and by those governing.

Since, as discussed below 1) mandamus and injunction are not available, 2) declaratory relief is available only to challenge regulations before a transaction occurs, and 3) the fact that administrative bodies are powerless to rule a statute unconstitutional, a denial of classification would effectively deny any remedy to taxpayers who overpaid relatively small amounts.

II.

ISSUE NO. 1: CONSTITUTION OF THE CLASS

Plaintiff seeks certification of two separate subclasses. The subclasses are defined as follows:

> (1) All persons in the State of California who from within three years prior to October 20, 1977 to the date of refund, were charged and paid more license fees or use taxes for registration of vehicles previously registered or titled outside of the State of California because those fees or taxes were based on the

actual cost of those vehicles rather than on the statutorily presumed price, in violation of the Commerce Clause of the Constitution of the United States and of the Equal Protection Clause of the Constitution of both the United States and California (the "Discrimination Class")

(2) All persons in the State of California who since November 14, 1976, have paid excess use taxes for registration of motor vehicles because of the illegal abandonment of the statutory presumption of R&TC Section 6276 (the "Post-1976 Class").

1. THE DISCRIMINATION CLASS.

APPROXIMATE NUMBER OF PERSONS IN THE CLASS.

(a) The preponderance of the evidence submitted both at the trial on the merits, and during the class certification hearings, demonstrates that there are approximately 2.8 million persons in the Discrimination Class. Declaration of C. Patrick Woosley in Support of Motion for Class Certification ("Woosley Declaration"). [See also, Defendants' Opposition (hereinafter "D.O.") p. 23:9; S.D. par. 50, Maita CCH 15:14-17]

(b) GENERAL GEOGRAPHIC LOCATION.

This subclass is composed of persons who purchased vehicles which were previously purchased, titled or licensed out of state, and paid license fees or use taxes based upon a discriminatory practice of the DMV and the SBE. Logic dictates, and this Court so finds, that the members of this subclass reside throughout the State of California.

(c) STATUS OF THE CLASS MEMBERS.

The status of the class members of the Discrimination Class is relevant to this action because, as a group, they have suffered unlawful discrimination. The class members

have all purchased nonresident vehicles and have been charged excessive license fees or use taxes in violation of the Commerce Clause of the United States Constitution and the Equal Protection Clauses of both the United States Constitution and the California Constitution.

(d) LEGAL AND FACTUAL ISSUES THAT MUST BE LITIGATED BETWEEN CLASS MEMBERS.

There are no legal or factual issues in this action that must be litigated between the subclass members.

(e) DESCRIPTION OF CLASS MEMBERS WHOSE CLAIMS MUST BE APPROVED OR EVIDENCE PRESENTED ONLY AS TO EACH INDIVIDUAL MEMBER.

The Defendants have the ability to identify each member of the Discrimination Class, determine the fact and amount of overpayment, and mail a refund to the last known address of each class member - all from records and documents presently readily available to, or already in the possession of the defendants. See Answer to Interrogatories 208 and 210, Exhibit 189; D.O. 22:23 to 23:3. Since the defendants have in their possession all records necessary to determine whether each class member is entitled to a refund, and the amount of that refund, no "evidence" as such must be presented by individual class members. As stated above, all liability issues have been decided in favor of the Discrimination Class. The only remaining determination is whether a person overpaid license fees and use taxes based upon the unlawful discrimination (and is thus a member of the Discrimination Class) and the amount of the overpayment i.e., the amount to be refunded. The law is clear that the fact that individual class members may have suffered different amounts of monetary damages is in no way a bar to class action certification. See *Darr v. Yellow Cab Company* (1967) 67 Cal.2d 695, 433 P.2d 732, 63 Cal.Rptr.

724 *Collins v. Rocha* (1972) 7 Cal.3d 232, 238, 102 Cal.Rptr. 1, 497 P.2d 225.

Whether or not individual claims will be required, whither instead the defendants will choose to utilizing claims and defendants records will be employed to effect repayment is a determination reserved until the Defendants present to this Court for review their proposed refund plan. In the first instance, the Court will leave to Defendants the right to propose the most effective and cost efficient method of refund to class members.

(f) OTHER FACTS WHICH DESCRIBE THE CLASS.

Not applicable

(g) THE MANNER IN WHICH AND THE TIME WHEN THE INDIVIDUAL CLASS MEMBERS WILL BE IDENTIFIED.

The evidence presented during the class certification hearings demonstrates conclusively that the Defendants can identify each member of the Discrimination Class through the use of a combination of data currently stored on the DMV's computers and had copy documents in the DMV's possession.

When a vehicle is registered in California it is given certain identifying codes, which the vehicle keeps throughout its life. Nonresident vehicles have been assigned specific codes which distinguish them from all other vehicles. Defendants have admitted repeatedly that through the use of the "VLF" codes and the "asterisk" year codes, all nonresident vehicles can be specifically identified through the means of a simple and inexpensive computer program. See Defendants' Answers to Plaintiff's Interrogatories No. 222, Exhibit 189; Maita CCH p. 20:7-16.

The DMV computers can only identify current owners of nonresident vehicles. (The reason for this is discussed at

length below in relation to issue number 3, "Superiority,") The Defendants "hardcopy" records, however, identify all class members who were prior owners of nonresident vehicles. Pursuant to a protective order obtained by plaintiff in this action on October 5, 1978, the Defendants have retained all the hard copy documents necessary to specifically identify each class member that cannot be identified using the DMV's computers.

It is clear from the evidence that each and every member of the Discrimination Class can be specifically identified, using either the DMV's computers or a manual review of DMV records.[3]

The timing of class member identification presents no problem in this action. Liability has already been determined against the Defendants. Now that this action has been certified as a class action, defendants must now immediately take efforts to implement a refund program to class members the license fees and use taxes illegally collected.

2. THE POST-1976 CLASS

(a) APPROXIMATE NUMBER OF PERSONS IN THE CLASS.

The preponderance of the evidence submitted demonstrates that there are approximately 14 million persons in the Post-1976 Class. Declaration of Alvin Cade in Opposition to Motion for Class Certification ("Cade Declaration")

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3. The only exception to the ability to identify every nonresident vehicle using the type vehicle codes is 1) vehicles other than automobiles or commercial vehicles, the registration of which have been transferred or renewed, 2) vehicles the registration of which was transferred or renewed before November 1975 The Court finds this exception to be de minimus and not relevant for class certification purposes.

p. 3:11-14; Woosley Dec. p. 5:1-3. Clearly, this is too large a number of individuals to bring before the Court.

(b) GENERAL GEOGRAPHIC LOCATION.

This subclass is composed of persons who were overcharged use taxes on the purchase of used vehicles based upon a taxing procedure which was instituted in violation of the California Administrative procedures Act, Govt. C. Section 11340 *et seq*, and which violates the express provisions of R&TC §6276, governing the collection of use taxes on private party vehicle transactions. As with the Discrimination Class, logic dictates, and the Court so finds that the members of the Post- 1976 Class reside throughout the State of California.

(c) STATUS OF THE CLASS MEMBERS.

The status of the members of the Post-1976 class is not relevant to the action.

(d) LEGAL AND FACTUAL ISSUES THAT MUST BE LITIGATED BETWEEN CLASS MEMBER.

The Court finds that there are no issues of fact or law that must be litigated between members of the Post-1976 class.

(e) DESCRIPTION OF CLASS MEMBERS WHOSE CLAIMS MUST BE APPROVED OR EVIDENCE PRESENTED ONLY AS TO EACH INDIVIDUAL MEMBER.

The Defendants, just as in the case of the Discrimination Class, have the ability to identify each member of the Post-1976 class, determine the fact and amount of overpayment, and make a refund to the last known address of each class member. See, (e) under II. above.

(f) OTHER FACTS WHICH DESCRIBE THE CLASS.

Not Applicable.

(g) THE MANNER IN WHICH AND THE TIME WHEN THE INDIVIDUAL CLASS MEMBERS WILL BE IDENTIFIED.

The discussion under II. 1., (g) above applies equally well here.

III.

ISSUE NO. 2: COMMON, SIMILAR AND UNIQUE QUESTIONS OF LAW AND FACT

1. COMMON ISSUES OF LAW AND FACT PREDOMINATE

The Court's extensive Statement of Decision on the liability phase of this action includes some 386 separately numbered paragraphs. Of these 386 paragraphs, eight relate to individual evidentially facts concerning individual plaintiff Woosley. The other 378 paragraphs all recite factual and legal determinations by the Court which are common to the members of the two subclasses plaintiff seeks to have certified. Beyond question, the common issues of law and fact vastly predominate over any individual issues, and the Court so finds.

Further, the only matters that remain for determination are whether individual putative class members are entitled to refunds, and the amount of these refunds. Since all of the facts applicable to each individual class member are shown in the records of defendants, these matters can and will be determined in a ministerial fashion and need not be tried on an individual basis.

All that is required to establish the right to a refund and the amount thereof for each individual member is the examination of electronic fields on the computer records of Defendants, and/or the paper files of the Defendants.

Predominance does not disappear because each member may be required by the circumstances to show that he is a

member of the class. *Collins v. Rocha* (1972) 7 Cal.3d 232, 238, 102 Cal.Rptr. 1, 497 P.2d 235.

Nor is a class action inappropriate simply because each member of the class may at some point be required to make an individual showing of eligibility for recovery and the amount of damages. *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266,178 Cal.Rptr. 612, 636 P.2d 575; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 815-816, 94 Cal.Rptr. 796, 484 P.2d 964; *Hypolite v. Carleson* (1975) 52 Cal.App.3d 566,579-580, 125 Cal.Rptr. 221.

The requirements of commonality and predominance simply prohibit the situation where numerous substantial individual issues must be litigated. They do not prohibit a plan of refund in which certain individual facts will be determined in a ministerial way.

The point is for the case not to split into numerous trials. *Hamwi v. Citnational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462, 140 Cal.Rptr. 215. The court in *Rosack v. Volvo America Corporation* (1982) 131 Cal.App.3d 741, 182 Cal.Rptr. 800, said, at 762:

> "Speculative problems wit regard to computation of damages should not have been fatal to certification here. Any one of a number of procedures were available which would have allowed this action to proceed. . . ."

The court in *Lowry v. Obledo* (1980) 111 Cal.App.3d 14, 169 Cal.Rptr. 732, distinguished *San Jose v. Superior Court* (1974) 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701, in which the *substantive theory of law* required that each plaintiff make a highly individualized showing of fact to establish his right of recovery:

> "Moreover, as the Court in *Darr*, [(1967) 67 Cal.2d 695, 63 Cal.Rptr. 724, 733 P.2d 732], recog-

> nized, a class does not suffer from an inefficient community of interest simply because its members will have to make a factual showing to determine the *amount* their damages." 111 Cal.App.3d at 26. (Emphasis in original.)

In the instant case, class members will not necessarily even have to make the individual factual showing approved in *Lowry*. Defendants need simply to open their eyes to the facts in their records in order to determine the amount of individual damages.

Further, the determination of individual amounts of damages will not render this action unmanageable. Courts historically have not balked at devising remedial procedures to channel through existing administrative forums individual determinations that need to be make. *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266, 178 Cal.Rptr. 612, 636 P.2d 575. Such determinations should, however, be under overall court supervision. Accordingly, when a refund procedure is approved by this Court, the procedure will be implemented under court supervision. See, *Miller v. Woods* (1983) 148 Cal.App.3d 862, 196 Cal.Rptr. 69.

Vasquez v. Superior Court (1971) 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964, directs trial courts to adopt innovative procedures which will be fair to the litigants and expedient in serving the judicial process. see also, *Keating v. Superior Court* (1982) 31 Cal.3d 584, 608, 183 Cal.Rptr. 360, 645 P.2d 1192, reversed on other grounds, (1984) ____ U.S _____, 79 L.Ed.2d 1, 104 S.Ct._____, in which the California Supreme Court directed the trial court to consider class arbitration.

In the instant action there are no variable circumstances which would affect liability or make calculation of damages unreasonably difficult. Personal injury, emotional distress,

state of mind, reliance, representations, and other elements requiring separate adjudication are absent.

2. THE DISCRIMINATION CLASS

(a) COMMON ISSUES OF LAW.

The Court has already decided all issues on liability in favor of the Discrimination Class. These legal issues are common to all members of the Discrimination Class. For example, see, S.D. pars. 7, 19, 63, 67, 83, 91, 95, 117, 223-228, and 231-241.

(b) SIMILAR ISSUES OF LAW.

The legal issues are common, rather than similar.

(c) UNIQUE ISSUES OF LAW.

The Court finds that there are none.

(d) ISSUES OF LAW THAT MUST BE LITIGATED BETWEEN CLASS MEMBERS.

The Court finds that there are none.

(e) COMMON ISSUES OF FACT.

The Court has already decided at the trial all of the factual issues determining liability in favor of the Discrimination Class. These factual issues are common to all members of the Discrimination Class. For examples, see S.D. pars. 22, 26, 27, 33, 34, 38, 42, 50, 81, 100, and 111.

(f) SIMILAR ISSUES OF FACT.

The issue of damages is one common to all class members. The calculation of the amount of individual damages is an issue of fact that is similar for all class members.

(g) UNIQUE ISSUES OF FACT.

The Court finds that there are none.

(h) ISSUES OF FACT THAT MUST BE LITIGATED BETWEEN CLASS MEMBERS.

The Court finds that there are none.

3. THE POST-1976 CLASS.

(a) COMMON ISSUES OF LAW.

The Court has also decided all of the issues determining liability in favor of the Post-1976 Class. These legal issues are common to all members of the Post-1976 Class. For examples, see S.D. pars. 126, 137, 162, 166, 214.

(b) SIMILAR ISSUES OF LAW.

The legal issues are common, rather than similar.

(c) UNIQUE ISSUES OF LAW.

The Court finds that there are none.

(d) ISSUES OF LAW THAT MUST BE LITIGATED BETWEEN CLASS MEMBERS.

The Court finds that there are none.

(e) COMMON ISSUES OF FACT.

The Court has already decided at the trial all of the factual issues on liability in favor of the Post-1976 Class. These factual issues are common to all members of the Post-1976 Class. For example see S.D. pars. 125, 131, 133, 133, 161, 198, 200, 210.

(f) SIMILAR ISSUES OF FACT.

See subparagraph (f) of the Discrimination Class section above.

(g) UNIQUE ISSUES OF FACT.

The Court finds that there are none.

(h) ISSUES OF FACT THAT MUST BE LITIGATED BETWEEN CLASS MEMBERS.

The Court finds that there are none.

IV.

ISSUE NO. 3.: SUPERIORITY OF THE CLASS ACTION TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY

1. and 2. THE DISCRIMINATION AND THE POST-1976 CLASS.

The legal issues and the facts relating to both sub-classes on the superiority issue are interrelated. Accordingly, they will be discussed together in this section.

1. GENERAL CONSIDERATIONS.

The Court in *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 142, Cal.Rptr. 325, said, "Substantial benefit to the litigants, including class members, and the courts ... is alternatively referred to as 'community of interest' and turns on the existence and extent of common questions of law and fact." 75 Cal.App.3d at 136. Discussing consumer legal remedies under the Civil Code, to which many courts to bar class relief based on the unlikelihood that individual class members would prove such small claims, the act would be self-nullifying." 75 Cal.App.3d at 137.

Civil Code Section 382 "... is a codification of 'the common law theory of convenience to the parties when one or more fairly represent the rights of others similarly situated who could be designated in the controversy.'" *Parker v. Bowron* (1953) 40 Cal.2d 344, 352, 254 P.2d 6.

"Where the issues are partly individual and partly collective, substantial benefits to the litigants and the court may justify a class action." *Slakey Brothers Sacramento, Inc. v. Parker* (1968) 265 Cal.App.2d 204, 209, 77 Cal.Rptr. 269.

Defendants argue long and hard that they should not be required to shoulder the burden of implementing a refund

program. As a practical matter, the Court recognizes that nay refund program involving large numbers of wronged claimants, too numerous to bring each before the Court, no matter how streamlined by the use of modern computer technology, may involve a considerable task and a considerable cost. Defendants' arguments that they should not be required to undertake this task are, however, unconvincing.

First, liability has already been decided in favor of absent class members on all matters except the amount of their individual damages.

Second, R&TC §10901 *mandates* the repayment of erroneously collected license fees. The question for this Court to determine is the fairest and most efficient procedure for repayment.

Third, if this action is not certified as a class action, notice of that determination will have to be given to absent class members. This is so because during the pendency of the class action the running of the statute of limitations on individual claims has tolled. See *American Pipe & Construction Company v. Utah* (1974) 414 U.S. 538, 94 S.Ct. 756; 38 L.Ed.2d 713, *rehearing denied*, 415 U.S. 952. Because liability has been decided in favor of absent putative class members, fairness will require notice to them that (1) they are entitled to a refund, and (2) the statute of limitations has again begun to run on their claims. Accordingly, whether the action is or is not certified as a class action, the burden of communication with putative class members will be essentially the same.

The issue, then, is whether claims and refunds will be handled *seriatim* by the defendants, without the benefit of review by this Court or oversight by plaintiff and his counsel, or whether instead this Court sill order and oversee the implementation of the refund program. The Court has concluded that the fairest and most efficient method of effectu-

ating the refunds required by statute and by this Court's determination of liability is through the certification of this action as a class action.

However, because there are management burdens inherent in the implementation of a refund program involving so many taxpayers, the Court will discuss them at some length.

2. MANAGEABILITY

The principal argument advanced by Defendants in opposition to Plaintiff's motion relates to the manageability of this action as a class action. Some courts speak of cases being unmanageable if individual issues predominate. That is not the case here. Defendants' manageability argument really boils down to one thing: burden. Defendants contend that the information necessary to (1) locate and identify class members, (2) determine whether they, on an individual basis, have overpaid use taxes and license fees, and (3) refund overpayments, cannot be accomplished from the DMV and SBE computer data base, and that to accomplish these tasks manually would be too overly burdensome to be warranted.

(a) DESTRUCTION OF EVIDENCE

Defendants' manageability argument comes as no surprise. The factual basis for the argument does. Defendants' contend that the computer data necessary to perform the requisite tasks does not exist. Hansen Dec. 2:1-6, Cade Dec. 2:19-23; D.O. 25:5-10; 29: 711. These factual contentions come as a surprise because (1) on October 5, 1978 plaintiff sought and obtained an order of this Court preventing defendants from destroying any records which contained the specific relevant data necessary to identify class members, determine the fact and amounts of overpayment and process refund, and, (2) plaintiff determined from the depositions of Defendants' personnel Sandra

Marsh and Silvio F. Suine on December 12, 1978, admitted into evidence, that the necessary data did in fact exist in hardcopy and in electronic form in the DMV and SBE computers.. Suine Depo. 31:ll-25; 35:2-20, Exhibit 136. Defendants' counsel assured Plaintiff's counsel on the record at the December 12, 1978 depositions that the electronically stored records would be preserved. Thereafter, on numerous occasions defendants' counsel reiterated assurances that all electronically stored data would be protected. Further, the parties stipulated to extend the protective order and specifically referred to the protection of computer stored data. See Exhibits 185 and 193.

On June 28, 1984 at the depositions of Mrs. Hansen and Mr. Cade, and at a subsequent informal interview of Mr. Suine arranged by Defendants' counsel, Plaintiff learned that notwithstanding the Court's Orders and the repeated assurances of defendants, both the DMV and SBE have erased from their computers many of the very records protected by the Court's order. See, Declaration of James M. Gansinger in support of Motion for Class Certification ("Gansinger Declaration"). Because this data has been erased, Defendants contend that the only way to accomplish the necessary tasks of identification and determination of overpayment is by manual review of hardcopy records, which defendants further contend is too difficult to be warranted. Suffice it to say, if there is some real burden here, defendants have themselves created it during the pendency of this action.

With this destruction of evidence, whether willful or merely negligent, the great weight of the equities, as well as applicable authority, militate heavily in favor of requiring the Defendants to shoulder whatever burden may be necessary to refund to taxpayers the monies unconstitutionally and illegally taken. See Evidence Code §413.

(b) AN UNDERSTANDING OF DEFENDANTS' PROCEDURES DEMONSTRATE MANAGEABILITY

It is necessary to have some understanding of Defendants' internal operating procedures to comprehend the superiority of a class action over other methods of recovery. Those procedures manifest that the means of administering class recovery are both available and superior.

(i) DMV REGISTRATION AND COMPUTER PROCEDURES

On each occasion that DMV registers a vehicle for the first time, it fills out a sub-form often referred to as a "rating box" which shows the amount of vehicle license fees, use tax, interest, penalties and other fees applicable to the transaction. Examples of the rating box are shown in Exhibit 183. A "rating box" is also completed on the transfer of ownership of a vehicle on DMV's records. The rating box appears on several different forms including titles and applications to register a nonresident vehicle. Other examples are shown in Exhibits 1, and 168 (third and sixteenth page of Exhibit 168).

Each number entered in the rating box is keyed into a computer terminal and a transaction computer tape is made containing these separate items of information. These transaction tapes are used to update the DMV's computer master file. The master file is an electronic record that is stored on hard disks. The information on these disks is available to DMV personnel and law enforcement authorities on an on-line basis.

There is another set of tapes called the daily log produced by the central processing unit (Daily Log tapes) reflecting the day's transactions. The transaction tapes are also used to update the "log file" which is a duplicate of the master file stored on computer tape. It is used for prepar-

ing renewal notices ("potentials") and other batch processing. It is not available for random inquiry.

Of the fee detail entered into the computer, only the use tax and the total fees are transferred onto the master file and the log file from the transaction tapes.

The separate figures for License Fee, use tax, penalties, etc., shown in each rating box, are summarized by sub-box to compile statistics for the DMV, and to compute the amount owed by DMV to the SBE.

The computer also creates a complete record of each transaction on microfiche.

All vehicles registered outside of this state and brought into this state as nonresident vehicles since 1975, are assigned a specific nonresident vehicle code that remains with the particular vehicle for its entire life. Hansen Depo. 40:15-17: Exhibit 137. This type code is preserved both in the electronic records and on the hard copy records.

Prior to November 1975 the DMV assigned a nonresident code to all nonresident vehicles, but the code was eliminated from the computer and the vehicle's subsequent registration documents upon transfer to another owner or upon a subsequent year's renewal of registration.

Prior to 1975, however, an additional code was assigned to nonresident vehicles which remains with each vehicle throughout its life, notwithstanding transfer or renewal. Hansen Depo. 9:18-26, Exhibit 138. This specific code, which is recapturable from the DMV computer, is called the "asterisk year" code.

The owner's name, address, the vehicle's license number, Vehicle Identification Number (VIN), year model, asterisk year, year first sold, type vehicle, license expiration date, issue date, VLF class, total fees on the last transaction, and use tax, if any, are contained in the master file,

and in the log file. An example of a computer print out from the master file of a vehicle is shown in Exhibit 168, fifth page. This information is also on the log file.

The normal practice of DMV is to retain output transaction tapes for approximately three weeks. CCH 9:26-28. However, despite stipulations of the parties and orders of this Court (Exhibits 185, 193), the electronic records for vehicles transferred since the first protective order was entered have been destroyed. Evidence at the Certification Hearings showed that the DMV could have saved all of the relevant information at a cost of approximately $7,500 ($5,000 to write a program and $2,500 in tapes). CCH 16:21-26; 22:3.[4]

(ii) DMV HARDCOPY RECORDS

The DMV establishes a paper or hardcopy file for each vehicle for each year for which there is activity other than renewal of registration on a "potential." A potential is the notice that is mailed to an owner indicating that the registration is about to expire. The files are organized by year, by license number.

The DMV's general policy was to keep the current year's file plus the three previous years' files. Although defendants violated the Court's order and destroyed computer records, the defendants have retained all of their relevant hard copy records.

The file for each particular year contains such things as a copy of the current title, a copy of the previous title surrendered to obtain the new one, bills of sale if needed to establish title, dealer reports of sale, dealer sales price certifications, etc. The "files" are sometimes referred to as a

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4. This court has reissued its protective order and the defendants have been instructed to keep this information.

"reg packet," short for registration packet. Exhibit 168 contains photocopies of several of the DMV's files. The court examined examples of "reg packets" during the certification hearings.

A computer printout of current registrations will produce the year of the last transfer of each vehicle. Inspection of the "reg packet' for that year will show the V.L.F., penalties, interest, and use tax paid.

Examination of the reg. Packet for a vehicle will also show the prior transfer on the old title certificate surrendered.

Working backwards chronologically from the current computer printout, one can locate each of the transfers in the hardcopy files, in reverse order from the issued dates.

Given the license number of a vehicle, the DMV can identify the vehicle if it is still reflected in the master files. Hansen Deposition, Exhibit 169.

The DMV has an Automated Name Index from which it can determine the address of anyone for whom it has a drivers license or automobile license file or record. With the make and the name of the subsequent buyer, the DMV can identify a vehicle if it is till owned by such subsequent buyer. Hansen Deposition, Exhibit 169. Automated cashiering offices enter the information into a computer controlled cash register which issues a detailed receipt. A copy of such a receipt is contained in Exhibit 168, at page 15.

Unless the motorist presents an acceptable bill of sale, the purchaser from a private party or from an out of state person must complete a certificate of purchase price. The certificate shows the price declared and the tax. The DMV sends these certificates, called Reg. 347s to the SBE.

(iii) SBE PROCEDURES

The SBE has three employees who manually review the approximate 1.2 million cost certificates received each year. These people have various price guides for use in their work. In addition to the use tax collections made by the DMV, the SBE also directly collects use tax on approximately 100,000 vehicles per year.

The SBE assigns each vehicle on which it assesses a use tax a file number starting with "SA". Exhibit 1. These files are physically interfiled with transit tax collections, vessel use tax collections and aircraft use tax collections. Each of these other types of accounts, however, has a different prefix.

The SBE has a computer index of its files showing name, account number, make of vehicle and license number. The normal purge schedule of this index is 18 months. Despite the Court's protective order, the purging has continued. Exhibit 178.

While it is true that the SBE's computer list does not have any designation for nonresident vehicles, the DMV computers have the ability to isolate all nonresident vehicles. Isolating these vehicles can provide a DMV master list of all nonresident vehicles also by license number and "VIN" number. A simple computer program can be written to cross reference and match the DMV's list of all nonresident vehicles with the SBE's list of all SBE direct use taxes collections and compute the use tax from the proper VLF code. This exercise will provide a list of all SBE *nonresident* direct use taxes collections. This list of SBE nonresident collections, listed by SBE's own "unique numeric system", will totally eliminate any necessity for the SBE's manual review of all of its use tax collection files to determine which are nonresident vehicles.

The output of the matchup program would be a list (with the correct use tax) of nonresident vehicles with SBE files.

These specific files can be pulled, and the use tax collected compared with the correct use tax shown on the computer list. Any excess would be refunded.

(iv) DETERMINATION OF BASE PRICE.

Defendants have contended that a refund program is not only unmanageable but impossible because the defendants cannot reconstruct base price information for prior years' vehicles. Based upon the evidence adduced during the Certification hearings, this contention is specifically rejected. The best method to begin the determination of whether class members have been overcharged is to compile a table of makes, models, years and VLF. This Court has previously ruled that the Rate Book should be the starting point for all vehicles with model years before 1968. The Rate Book contains a V.L.F. classification for substantially all makes and models of first sold in California prior to 1968 model year. S.D. par. 22.

The Base price can be determined for all makes and models, and the information could be placed in a format which could be accessed by the computer.

The computer master file contains records on approximately 19-20 million vehicles (D.O. 23:13-16) and approximately 14 million drivers (*AMIS Direct Access Inquiry Manual* Chapter 2 page MNO7-3, Exhibit 154).

The DMV has a number of sources available to it from which to compile the equivalent of a Rate Book for model years starting with 1968.

The DMV can obtain from the manufacturers and importers of vehicles copies of the price lists which manufacturers or importers distributed to their dealers. They should have lists of the base prices, destination charges, and smog equipment charges.

Jack Cary of the DMV testified at the liability trial (R.T. 19:15-28 and 24:10-18), that the DMV compiled a Rate Book listing makes, models, and VLF codes for many years prior to the 1968 model year, and that the manufacturers had made no change in their pricing policy which would make the task significantly more difficult today.

Kelley Blue Book and numerous other similar publications contain manufacturer's suggested retail prices. Exhibit 153. Defendants admit that these prices are accurate and know of no instance where the price shown is not correct. Answers to Interrogatories 304, and 306, Exhibit 184; See also, Exhibit 1, p. 4. *Kelley Blue Book* is regularly used by banks, leasing companies and dealers. Exhibit 153. The SBE has a complete set of *Kelley Blue Books* printed since to the early 1970's, and they use them daily. Deposition of Alvin Cade, 17:22-27; Exhibit 144. Such a source, then, is available for use, as well as several other published lists of suggested prices. The SBE currently has copies of many of these in its possession, and uses them daily. Deposition of Alvin Cade, Exhibit 144.

Defendants, nevertheless, contend without support that they cannot compile a list of makes, models, years, and suggested prices.

The smog equipment charge and the destination charge do not present significant or insurmountable problems. The DMV requires dealers to itemize these two items on forms submitted by dealers, Exhibit 39.

Accuracy in the absolute is not essential. For instance, the VLF for nonresident vehicles was assessed on the basis of the applicant's *memory* of the price paid and the date the vehicle was purchased.

(v) COMPUTER SCREENING FOR NONRESIDENT TYPE VEHICLE CODES.

Once a base price list is compiled in electronic form, the DMV's computer master file and other electronic records can be screened to identify vehicles with nonresident type vehicle codes. It is not critical to determine that vehicles assigned a nonresident code by the DMV were in fact *originally* sold outside of the state. The important fact is whether a vehicle which has been titled or registered out-of-state, i.e., in interstate commerce, and has been charged higher fees and taxes because of its nonresident status.

The nonresident code designations on DMV registration materials are type codes 13, 16, 17, 23, 33, 36, 37, 43, 63, 64, and 83. D.O. 22:23-27.

Given the VLF alphabetic code and year for a code for a vehicle, the DMV can compute the VLF for each year of the life of the vehicle. Hansen Deposition, Exhibit 164.

(vi) COMPUTER SCREENING FOR ASTERISK YEAR.

The DMV has retained unique nonresident vehicle type codes on automobiles and commercial vehicles since 1975 (D.O. 23:25), but does not retain nonresident type codes on other types of vehicles when their registration are renewed, and did not retain nonresident type codes on vehicles other than automobiles or commercial vehicles first renewed before approximately November 19, 1975. Hansen Deposition, Exhibit 138.

Nonresident vehicles are assigned an asterisk (*) year to indicate the year in which the first person to register the vehicle in California purchased the vehicle. Exhibit 42, Sec. 35.110(3).120. R.T. 37:20-24;

Therefore, the presence of an asterisk year is an indication that a vehicle is a nonresident vehicle.[5]

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5. A vehicle can also have an asterisk year because it is a specially constructed vehicle (SPCN or SPCNS), a revived junk, a reconstructed vehicle, or a modified vehicle. D.O. 22:16-18. These categories do not destroy the usefulness of the asterisk year designation to identify class members. SPCNs are readily IDENTIFIED because they are so designated in the "make" field of the records. See Exhibit 183. Prior to the 1967 change in the statute (R&TC §10752), revived junks and reconstructed vehicles kept the same classification as other examples of the model. Exhibit 3, especially Sec. 2.0410.

This Court has ruled that a vehicle should not have a different year starting the depreciation schedule (have an asterisk year) by reason of being a nonresident (S.D. par. 96 *et. seq.*), because the 1967 change in language was not intended to change the prior practices and interpretations, just to change the source of the information.

There is no statutory justification for assigning a vehicle a new VLF classification and asterisk year because it has been reconstructed or is a revived junk. If it is in substantially the same configuration as when it left the factory, it should be classified the same. These vehicles do not fit into the definition of modifications. Substantially the same definition of modification has been in affect since 1949 (R&TC §10753(b)), and it was interpreted up until 1967 to exclude revived junks and reconstructed vehicles.

Defendants' contention that reconstruction costs are relevant to the establishment of the proper VLF, is unsupported and incorrect. The statute and a long line of contemporaneous administrative interpretations show that reconstruction costs are irrelevant to the VLF.

The only statutory basis for changing the VLF classification of a vehicle is R&TC section 10753(b) which says:

In the event any vehicle is modified or additions are made to the chassis or body at a cost of two hundred dollars ($200) or more, but not including any change of engine of the same type or any cost of repairs

to a vehicle the owner of such vehicle shall report any such modifications or additions to the department and the department shall classify or reclassify the vehicle in its proper class as provided in Section 10753.2, taking into consideration the increase in the market value of the vehicle due to such modifications or additions, and any reclassification resulting in increase in market value shall e based on the cost to the consumer of such modifications or additions. In the event any vehicle is modified or altered resulting in a decrease in the market value thereof two hundred dollars ($200) or more as reported to and determined by the department, the department shall classify or reclassify the vehicle in its proper class as provided in Section 10753.2.

The *Vehicle License Fee Rate Book* Exhibit 3, Section 2.0410 says,

However, should the net result of a reconstructed vehicle be a standard model which is listed in the rate book, the alphabetic part of the Vehicle license Fee Classification should be taken from the rate book. This procedure should also be followed in the event that the only difference in the reconstructed vehicle to be classified, as compared with a listed vehicle, is the fact that the motor installed is not the same as the standard motor.

The *Registration Manual* (Exhibit 162) says, at Section 8.110:

A reconstructed vehicle is one which has been materially altered from its original construction by the removal, addition or substitution of essential parts. The make of the vehicle remains the same, but the alteration has changed its appearance to resemble a different manufactured make. For example: the cab of a Kenworth truck is replaced with a Peterbuilt cab or a Mack cab with a Kenworth Cab. . . When the process of removal, addition or substitution of essential parts on a passenger vehicle results in a product that no longer resembles the recognized manufacturer's make originally constructed, it is registered as a new vehicle.

The term "modified" refers to a vehicle whose configuration has been changed significantly. in other words, if a registrant had con-

The fact that the vast majority of asterisk year vehicles are nonresident vehicles is supported by the DMV's Asterisk Year Report which shows dramatic increases in the percentage of total vehicles which are asterisk year vehicles for model years after the DMV started assigning asterisk years to nonresident vehicles. See, Exhibit 163. The percentage of asterisk year automobiles to model year automobiles for years before 1967 were less than 0.2%. For the 1974 model year asterisk year vehicles constituted 3.9% and for 1983 it was 9.4%. (97,223 out of 1,036,949).

The evidence shows that the *only* nonresident vehicles that could not be identified using the DMV computer master file would be nonresidents who bought vehicles *new* out of state *from dealers*, stated that fact to the California DMV upon registration in California, and then resold those vehicles or renewed their registration prior to November 1975. See Hansen Depo. 42:20-26, Exhibit 141.

To be able to identify each nonresident vehicle using the DMV's master computer tape, except for the extraordinarily small exceptions, demonstrates the manageability of the identification issue.

Although there is no existing program to extract asterisk year of vehicles from the computer (D.O. 22:14-16), the preparation of such a program would be extremely easy and would likely cost less than a couple of thousand dollars. CCH 20:6-16.

(vii) THE EXISTENCE OF DMV'S HARD COPY AND COMPUTERIZED RECORDS MAKES THIS ACTION MANAGEABLE

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verted a Ford sedan into a Ford pickup truck that vehicle would be considered a "modified" vehicle.

The statute specifically excludes repairs from triggering revaluation.

The discussion above leads the Court to the following conclusions.

First, with respect to the vehicle license fee overcharges virtually all overcharges can be isolated and calculated using the DMV's computer records.

Second, to the extent that the computer records are not available to identify, isolate and calculate overcharges, that unavailability is a result solely of the defendant's destruction of Court protected evidence.

Third, to contend that a class action is not maintainable because data admittedly in existence (the hardcopy registration packet files) is not entirely in computerized form is, on it face, absurd. Such an erroneous contention would mean that any time there are large numbers of claimants in a class, a class action would be unmaintainable unless the defendants in the action had computerized all of their records. This contention amounts to the creation of a new class action maintenance requirement - existence of computerized records.

The fact is that all of the necessary data to identify claimants, calculate the amount of overpayments, and make refunds is available in either computerized form or in hardcopy. The information that would be obtained from the hardcopy files could, once obtained, be input into the Defendants' computer and run against a relatively simple program capable of both calculating the amount of overcharge and generating refund checks.

In short, the bulk of the actual difficult work to be done, i.e. determination of overpayment, calculation of the amount of overpayment, and generation and distribution of refund checks can all be done on Defendants' computers.

(d) REFUND STRATEGY

Part of the consideration of manageability must be whether or not refunds to the class are feasible and efficient.

Here, there are several options available for making class refunds. A refund plan might include identification of class member by the use of computer records supplemented by an examination of hardcopy records, a 100% examination of hardcopy records, a claims procedure, or a combination of these methods.

(i) DMV COMPUTER INITIATED REFUNDS.

Some refunds of VLF can be made automatically by a computer program without searching hardcopy records or obtaining a claim form from class members. The DMV's electronic files (the master file and the log files) indicate a "paper issue date" or "issued". Exhibits 165, 166,168. This is the date on which the later of the last transfer, last registration other than a registration based on a potential, or last certificate of title was issued.

The computer also shows when the latest registration expires or expired. Exhibit 165.

If the "issue paper date" shown in the computer records for a vehicle is within a year of the asterisk date, then the current owner has owned the vehicle for all of its California life, and the DMV could mail full V.L.F. refunds for the vehicle without examining hardcopy records or requiring a claim form.

If the "issued date" is later than the asterisk year, the DMV could mail refunds for the period beginning with the "issue date' through the expiration date to the vehicle's current owner. The entitlement of prior owners to refunds could be determined from hardcopy records or by use of claim forms.

Where the DMV's electronic records are not sufficient, notice could be sent stating that the vehicle had been identified as a potential for refund, or the hardcopy file corresponding to the issue date could be examined to determine from the transfer document the name and address of the previous owner and his issue date.

If examination of files is necessary, the evidence shows that the process can be accomplished as follow; Starting with a vehicle identified by the computer, the DMV by using the license number would locate the hardcopy file for the vehicle. An exemplar is Exhibit 168. This file contains the name and address of the previous owner, and the "paper issue" date for the previous owner's title. The file also contains the amount of VLF, use tax, interest and penalties collected. Checking the similar file of the previous owner for his "paper issue date," would lead to any prior owners and all relevant data.

(ii) CLAIM FORM PROCEDURE

If a claim form procedure is used, it too would be manageable. The DMV has regular computer generated large scale mailings in connection with renewals of vehicle registration and driver's licenses.

Notice to the classes could be sent in all vehicle license fee renewal notices (potentials), renewals made by mail, driver's license renewal notices, and driver's license renewals.

The cost involved in such a ailing are clearly not unreasonable in light of the sums involved in this action. To insert one sheet of 16 pound stock paper measuring 7-1/2 inches by 3 5/8 inches in all potentials mailed by the DMV at $0.005 each in all 19 million potentials would cost $95,000.00 D.O. 23:13-16. To insert a similar notice in the driver's license renewals would cost $80,000.00. D.O. 24:3-6. It would cost an additional $10,000 per year to in-

sert such a notice in each of the two million original and replacement drivers licenses mailed each year. D.O. 24:6-9. Only 4.5% of the DMV's potentials are returned undeliverable, and potentials are used for 76% of renewals. D.O. 23:20-22.

If the option of requiring claim forms in some or all cases is used and information is requested or required from a registrant, it could include:

1. Proof of ownership prior to the latest paper issue date.

2. A request for a use tax certificate:

3. A declaration that the vehicle was not purchased from a manufacturer or dealer.

4. A declaration of the price on which tax was paid, and the amount of the tax.

There was evidence introduced concerning the SBE's practice of collecting use taxes on transactions which involved nonresident owners that have already paid some use or sales tax to other states. In such situations the State of California is entitled to the difference between what has already been paid and the amount that would be due on a California use tax transaction. in a series of questions relevant to the state's position concerning the necessity of "proof" of actual payment, an SBE representative was asked what "proof" was required of applicants who contended that they had previously paid some use or sales tax on their purchase transaction to another state. Cade Depo. 45:27 to 46:25 to 48:10, Exhibit 145.

The SBE witness testified that the only "proof" required in such transactions was the signature of the applicant on the use tax credit form (Reg. 346). Defendants' contention that refunds are not possible because refund claimants will not have documentation available to "prove" their claims,

when no such documentation is required in other customary use tax collection transactions, is unsound. No such "proof" is necessary in other use tax transactions and it would not be required here.

(iii) DMV USE TAX COMPUTER SCREENING

The DMV could program its computer to screen its electronic records for use tax figures, compare them to the proper use tax based upon the chart method and make refunds. Information on use tax paid is available on computer if the license has not been renewed since the tax was paid. Many refunds can be made this way, especially on transactions after July 1983, since DMV has been ordered to maintain this information. Unfortunately, the DMV has purged its files of much of the information on prior transactions, despite this Court's prior order (D.O. 33:17-19). So, all use tax claimants cannot be identified in this manner. The Defendants carry an extra burden to identify, locate and notify members of the Post-1976 Class because of this purge.

(iv) SEARCH OF DMV HARDCOPY RECORDS.

It is practical to perform a 100% search of the DMV's hardcopy records for computing refunds to both subclasses. This procedure would likely maximize the number of class members that ultimately would receive refunds.

Defendants submitted evidence that merely to locate and examine each of the thousands of documents allegedly necessary to determine the nonresident type code, the vehicle purchase price, date of transfer, use tax collected and the name and address of the previous owner would cost $1.61 per document. Hansen testimony, CCH 24:15 to 26:21. There are approximately 275,000 such documents to locate for each relevant year. D.O. 23:4-10.

On cross-examination, however, defendants' representative admitted that the method selected by Defendants on

which they based their cost estimate was perhaps the least efficient method of accomplishing the task, since it was based upon the cost of a clerical employee leaving his or her work station and traveling to a file location to locate documents on a one-document-per-trip basis. Clearly, if a manual search of records is required, it can be done on a vastly more cost efficient basis.

To rebut defendants' cost contention, Plaintiff submitted evidence in the form of declarations of a management consultant expert in systems analysis. The crux of this evidence, which the Court also views with some skepticism, is that by using modern systems management techniques, the Defendants' hard copy records can be sorted by clerical personnel and electronically inputted by data processing personnel extremely economically.

Although the Court is not convinced that either Defendants or Plaintiff has correctly gauged the actual cost to manually review defendants' hard copy records, the Court is convinced that the preponderance of the evidence supports Plaintiff's contention that if manual review of records is desirable, the cost to review these records, when compared to the potential recovery per class member, is not so great as to warrant denial of certification.

To do a 100% search for file years after 1976, the clerical person would be looking for (1) a nonresident type code, (2) an asterisk year, or (3) the payment of a use tax.

The type code and asterisk year appear in specific blocks on the first page of the reg. packet, and the use tax appears in a specific block on the second document in the packet. The court examined examples of the packets and determined that examination of this information could be done very quickly.

Once found, qualifying reg. packets could be separated into nonresidents (potential Discrimination Class members)

and use taxpayers (Post-1976 Class members) for separate handling. ("See Gary Michaels Declaration.")

As to periods prior to November 15, 1976, vehicles without nonresident type code or asterisk year designations need not be examined because resident vehicles prior to then are in neither class.

The files are not in file folders, and the DMV has strict specifications for the order and arrangement of the files. *Registration Manual*, Chapter 1. Exhibits 162, 176.

The number of typecodes for which the clerk would be looking is a manageable number which should be easily learned.[6]

Using this approach, clerks could go through the file drawers or boxes searching the top document in each packet for nonresident codes and asterisk year designation.

The placement of this information is highly standardized. Examples found would be place in a nonresident stack for further processing.

If the vehicle is not coded as a nonresident and the transfer took place after November 14, 1976, the clerk would also examine the rating box on the second full page of the packet to determine if use tax had been paid. If so, the packet would be selected for use tax processing.

A clerk would then compare any use tax paid to a use tax table.

Where the amount collected was more than the use tax shown on the table the data would be keyed into a com-

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6. While here are a number of different nonresident typecodes, they are relatively specific to the license number series. For instance, when sorting the automobile series, one does not need to look for commercial typecodes.

puter. Plaintiffs submitted evidence from an expert that each of the above steps could be done at a very rapid rate. See Michaels Declaration.

According to plaintiffs' expert, the total clerical time for this process is 1.80 hours per 1000 reg. packets. Michaels Declaration 6:17. According to the expert, the total data entry time is less than 2 hours per 1000 reg. packets. Michaels Declaration 6:18.

While the Court is not convinced that the projections of plaintiff's expert are completely accurate, the evidence does indicate the relative simplicity and the ministerial nature of the requisite risks for identifying class members and determining the amounts of individual damages/refunds.

The cost of identifying class members, determining the amount of overpayment and refunding the overpayment, while certainly not insignificant, does not render the action unmanageable nor warrant denial of certification. The evidence shows that to review manually the hardcopy files and obtain the necessary information to implement a refund program, would be no more difficult from a clerical task standpoint than the original effort required to determine and assess the license fees and use taxes when collected. In other words, it will not be anymore difficult to pay back these illegally collected taxes than it was to collect them in the first instanced. See, Hansen Deposition 80:11-19, Exhibit 143.7

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7. To avoid continuing discrimination against nonresident vehicles, it will be necessary for the DMV to assign the correct VLF codes to nonresident vehicles. Registration certificates could be corrected during the renewal process, and ownership certificates could be corrected on transfer.

Defendants' contention that the issuance of corrected titles and registration certificates to reflect the correct codes would be an unreason-

(d) THE FACT THAT DEFENDANTS HAVE AGREED TO, AND HAVE DISTRIBUTED AMOUNTS TO OTHER JURISDICTIONS BASED UPON THE AMOUNTS COLLECTED DOES NOT DEFEAT CLASS CERTIFICATION

Defendants contend that manageability is defeated because of the alleged complexities caused by the transfer of funds between the DMV and SBE, the distribution of funds among government agencies, the deposit of funds with the State Treasury, the DMV's reporting responsibilities to various counties and the split of these funds amongst government entities. What the Defendants do internally or amongst themselves as a consequence of being required to pay back illegally charged fees and taxes is not of much concern to this Court's consideration of whether this action is maintainable as a class action. Defendants cannot be permitted to create some internal labyrinth of charge backs and use that to attempt to defeat plaintiff's class.

While a cursory reading of *Bacom v. County of Merced* (1977) 66 Cal.App.3d 45, 136 Cal.Rptr. 14, might suggest that the fact that the money had been distributed foreclosed class action relief, a closer analysis makes it clear that it was in fact the preponderance of individual issues that caused the action to be unmanageable. Over 300 jurisdic-

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able burden and defeats class certification, is not correct. The burden is caused by liability being found against Defendants. DMV knew that it was discriminating against nonresidents, but did nothing about it. A class action should actually ease the burden because the reissuance can be conducted in an organized fashion. The recent conversion to year-round registration demonstrated that defendants have both the ability and the administrative experience to undertake and accomplish the less burdensome tasks involved in the instant case. See, *Halford v. Alexis* (1981) 126 Cal.App.3d 1022, 179 Cal.Rptr. 486, for a description of the conversion.

tions were involved in situations where guilty pleas had been set aside, but no refund of fines had been requested. Each jurisdiction had its own records of its cases and there was no evidence that the records were similar. The burden, said the Court, would have landed on the entire judicial system, involving uncentralized records and requiring a substantial and careful review of each court file. In the instant case, there is centralized filing and basically one source of information the DMV.

Also, the failure of those who had petitioned to have their convictions set aside to request refunds also raised unique and individual issues of laches in *Bacom* unlike the instant case, where individual issues are not present.

Further, there is a heavy flavor in *Bacom*, that the equities weighed heavily against the putative class of convicted drunk drivers and in favor of both the 300 jurisdictions that would be burdened with the review process and the recipients of the distributed funds. Also, in *Bacom*, the case on which the overturning of the convictions was based was specifically not retroactive.

The legislature has set the procedures for tax refunds and Woosley has followed them. The *Bacom* court itself reiterated that class actions are proper when they serve justice. 66 Cal.App.3d at 48. Class certification serves justice here.

Another reason why arguments concerning defendants funding problems are not convincing is that defendants would be faced with the same funding problems if individual actions were filed. The question now is how best to return the illegally collected taxes, not whether they should be returned. It is no defense to assert that "We have spent the money." The class action rules do not change the substantive law. *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 130, 179 Cal.Rptr. 342.

To raise such a defense in a class action where there is a community of interest among ascertainable classes is a tacit admission that the Defendants seek to use procedural barriers and the cost of individual law suits to keep the money to which they are not entitled.

Lastly, the discussion in *Bacom* of what the courts had done with the money simply highlights a case which had clearly failed the identifiability and community of interest requirements for class action certification. Certification of a class there would not have been beneficial to the court system or the litigants.

(e) CALIFORNIA'S STANDARD ON CLASS MANAGEABILITY IS A LIBERAL ONE.

The California standard on manageability in class actions is more liberal than the Federal rule. There have been a number of California cases certified which would not pass the Federal standard. See *Darr v. Yellow Cab Company* (1967) 67 Cal.2d. 695, 63 Cal.Rptr. 724, 433 P.2d 732.

California has denied certification due to difficulties in management only in extreme cases. An example is *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 134 Cal.Rptr. 393, 556 P.2d 755 where certification was denied because there were no detailed records, individual refunds were impractical and the massive decline in use of premium trading stamps made fluid recovery inappropriate.

The facts in the instant case are quite different. There has been no massive decline in nonresident vehicle registrations, nor in people paying use tax on vehicles. Detailed records have been retained. Individual claimants and the amounts due each can be determined and refunded.

Another extreme case where management difficulties precluded certification is *Diamond v. General Motors Corp.* (1971) 20 Cal.App.3d 374, 97 Cal.Rptr. 639, which in-

volved 293 defendants acting independently of each other, and seven million plaintiffs with ill-defined damages.

The existence and availability of organized, detailed and dispositive records clearly distinguishes this case from *Blue Chip Stamps v. Superior Court, supra, Devidian v. Automotive Service Dealers Association* (1973) 35 Cal.App.3d 978, 111 Cal.Rptr. 228 [gasoline sales], or *Hackett v. General Host Corp.* (E.D. pa. 1970) 1972 Trade Case para. 73,879, aff'd. 455 F.2d 618 (3rd Cir. 1972), *cert. den.*, 407 U.S. 925 (1972) [bread sales]. The DMV has precise records of transactions. Likewise, vehicle titles, registration certificates and DMV receipts are much more likely to be kept by the public than records of purchases with premium stamps, purchases of bread, or gasoline.

The records here are for better than in *Javor v. SBE* (1974) 12 Cal.3d 790, 117 Cal.Rptr. 305, 527 P.2d 1153, where class certification was granted. There the records were in the hands of hundreds of automobile dealers around the state, rather than in the hands of the defendant state agencies.

(f) ALTERNATE FORMS OF LITIGATION.

In determining whether a class action is superior to other forms of relief, the Court must consider alternative forms of litigation. The alternative forms of litigation - individual suits, an injunctive action, or mandate - are either not available, impractical or not fair or efficient.

The courts have treated as suspect attempts to promote alternative litigation methods when motivated by a desire to reduce damages, rather than to minimize the cost of litigation, especially after liability has been determined.

> [T]he federal courts have consistently and firmly adhered to the principle that once liability has been demonstrated, complexity or uncertainty as to the amount of damages will not preclude recovery

> [citation] *Rosack v. Volvo of America Corp.* (1982) 131 Cal.App. 3d 741, 761, 182 Cal.Rptr. 800.

In explaining why individual law suits were not superior to a class action where there is a clear community of interest, the Court in *Harrison v. Board of Supervisors* (1975) 44 Cal.App.3d 852, 863, 118 Cal.Rptr. 828, stated:

> The legal expense necessarily incurred by an individual in pursuit of nullifying an unjust assessment would make for a "Pyrrhic victory" even if successful in having the levy set aside.

Defendants have suggested that injunctive relief or a writ of mandate would provide more practical relief. Except in extremely rare circumstances, however, it is a cornerstone of American jurisprudence that the proper way to contest the application of a tax is to pay the tax and follow the refund steps set forth in the statute to obtain a refund of illegally collected taxes. *Dows v. City of Chicago* (1871) 78 U.S. (11 Wall.) 108, 110, 20 L.Ed. 65, 66.

Further, the collection of taxes cannot be enjoined, nor a writ of mandate issued. *California Constitution*, Article XIII, Section 32; R&TC §6931. *Pacific Gas and Electric Co. v. SBE* (1980) 27 Cal.2d 277, 283-284, 165 Cal.Rptr. 122, 611 P.2d 463; *United State Steel Corporation v. Franchise Tax Board* (1983) 144 Cal.App.3d 473, 192 C.R. 677.

Indeed, the injunctive cause of action in the original complaint in this case was challenged in Defendants' Answer as not available.

Lastly, requiring individual actions would not be a viable alternative. Given that all facts governing Defendants' liability to each absent class member have been decided, the only way that individual actions by class members would prove more efficient to defendants or the Court, is if they were barred or not filed. Such a result would be inimical

to the public interest, would run contrary to the time honored principle that for every wrong there is a remedy, and would violate the very spirit of the class action device.

(g) MAINTENANCE OF THIS ACTION AS A CLASS ACTION WILL BE BENEFICIAL TO THE MEMBERS OF THE CLASSES

The amount of individual recoveries has been considered by this Court. The Court would not certify this action as a class action if the combined attendant costs of a refund program and attorneys fees consumed the bulk of the projected recovery.

Defendants' contend that the typical recovery of members of the class would be miniscule. Labelling the VLF overcharges as miniscule is, however, inconsistent with this Court's Statement of Decision, paragraphs 42, 45, 46, and especially 50. The Statement of Decision found that the average nonresident VLF was $23.03 higher than the average resident VLF in 1979. The difference between nonresident registrations and renewal registrations if $32.01 in December 1983. The average renewal fee was $41.26 and the average nonresident fee was $73.27. See Exhibit 179.

Further, defendants' admitted at the certification hearing that the average VLF recovery alone would be in the range of $80 or $90. CCH 35:3-22. Such a recovery is considerable higher than the average refund in the majority of the class action cases that have been certified. Indeed, to the extent this action can be considered a consumer type action, it may well represent one of the largest recoveries per class member of any consumer class action.

Likewise, the average use tax refund will not be miniscule. The average increase in use tax collections from elimination of the chart method was at least 47%. D.O. 18:26 to 19:1.

Vehicle use tax collections increased from $7.84 million per month to $10.64 million per month. S.D. para. 198. This difference ($2.8 million) times 12 months is $33.6 million. Exhibit 80 suggests that these may be conservative numbers, and that the actual increase was 68%.

Use tax is collected on approximately 1.7 million transactions. D.O. 34:8-11.

This Court takes judicial notice of SBE's statement to the Supreme Court in its petition for hearing in *Golden State Mobilehome owners league v. SBE*, San Francisco Superior Court, Case No. 715684, Supreme Court No. SF24576, that an amount in excess of $100 million dollars would have to be refunded if , as decided herein, the 1976 change in interpretation of Section 6276 was improper. Exhibit 180. See also, Woosley Declaration 6:21-24. Defendants' own admissions show that this case does not involve "miniscule" recoveries.

In situations where detailed records of class member transactions are available, few California courts have discussed the effect of the size of the average recovery on the propriety of class certification. Some of the certified cases which show low average or typical recoveries are *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 117 Cal.Rptr. 205, 527 P.2d 1153 [$12 to $15, CCH 45:5-26]; *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 179, Cal.Rptr. 342 [$125, with poor records to effect repayments]; *Los Angeles County Democratic Central Committee v. County of Los Angeles* (1976) 61 Cal.App.3d 335, 132 Cal.Rptr. 43 [$50].

In several other certified classes where the total size of the transaction is disclosed, and the amount in controversy was less than the full amount, the full amounts are small enough to demonstrate that the typical recoveries were smaller than in this case. See *Lazar v. Hertz Corporation*

(1983) 143 Cal.App.3d 128, 191 Cal.Rptr. 849 [$6 average], and *Darr v. Yellow Cab Company* (1967) 67 Cal.2d 695, 63 Cal.Rptr. 724 [representative plaintiff's transactions totaled $200].

In the instant case, even if hard copy files had to be examined, the administrative cost to handle the refunds appears to be but a small percentage of the average refund. Additionally, refunds made on documents provided by the taxpayer, or from electronic records would cost even less.

It is clear that the members of the classes herein would receive a substantial recovery, and that such recovery would be much greater than in the cases cited by Defendants. *In Blue Chip Stamps v. Superior Court*, *supra*, 18 Cal.3d 381, 134 Cal.Rptr. 393, 56 P.2d 755, a class member would have had to purchase $20,000 worth of merchandise to receive a refund of $10.

Federal cases provide only limited guidance on the issue of size of recovery because of different attitudes on notice and fluid recovery. See, *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 126-130, 179 Cal.Rptr. 342; *Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 969, 124 Cal.Rptr. 376. In *Eisen v. Carlisle & Jaquelin* (2nd Cir. 1973) 479 Fed.2d 1005, the average refund would have been $3.90. *In re Hotel Telephone Charges* (9th Cir. 1974) 500 Fed.2d 86, involved an average recovery of $6 (D.O. 54:1-2), and in *Stilson v. Readers Digest Association* (1972) 28 Cal.App.3d 270, 104 Cal.Rptr. 581, the recovery would have been less than $1, and the state of mind of each class member was a substantial issue.

3. THE VALUE OF CONTINUED COURT SUPERVISION

One of the most compelling reasons why maintenance of this action as a class action provides the fairest and most efficient method of protecting the rights of the parties is the

fact that the Court will supervise and oversee the refund process.

Several factors demonstrate the value of continued supervision by the Court, with the help of Plaintiff an his counsel. Rather than trying to make a refund procedure more efficient, Defendants' strategy to date appears to be to avoid refunds by creating a draconian obstacle course which taxpayers must navigate to obtain the refunds to which they are entitled. As example is that the DMV changed its rule allowing the use of photocopies to establish the VLF code assigned to a vehicle. *Registration Manual* Section 1.121. Exhibit 176.

Defendants represented to this Court during briefing on the liability phase that the presumption of Section 6276 was still being used when a person had no record of the price paid for a vehicle. Yet in sworn answers to interrogatories they admitted that the Section is not being used at all. Exhibit 189.

Defendants presented evidences that it would have cost $200,000 to keep the electronic records which they had destroyed. On cross-examination, the evidence showed it could be done for less than $10,000. CCH 11:7 to 12:15; 15:11 to 22:4.

DMV declarations under oath swore that refunds could not be made because of the poor condition of records caused by flooding. D.O. 25: 19-22. Inspection of the records by Plaintiff and his counsel demonstrated the invalidity of the contention and it was immediately abandoned.

When asked the cost to manually review records for nonresident vehicles, the DMV responded with the cost to make *separate* trips to the files for each of the approximately 275,000 reg. packets per year.

Despite Defendants' experience with class actions and their undisputed knowledge of the importance of electronic

records, the records were destroyed, in spite of Court orders and repeated agreements between counsel for the parties.

Defendants have argued that each claimant's individual facts must be proven in court, despite the fact that the facts are not in dispute and despite the fact that this is not required by California authority. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964; *Collins v. Rocha* (1972) 7 Cal.3d 232, 102 Cal.Rptr. 1, 497 P.2d 255; *People v. Levi Strauss*. San Francisco Superior Court Case No. 739024.

Given the number of documents that comprise the bulk of the evidence in this action, and given the complexity and importance of the issues, particularly the constitutional issues, it is likely that the supervision of a refund plan by this Court will be less of a burden time wise on the judicial system than even a single re-litigation of the issues in another individual case.

If there is to be a fair and efficient procedure to refund the overcollections, the Court concludes that the superior method is under this Court's supervision of this class action.

V.

ISSUE NO. 4: MEMBERSHIP OF THE CLASS REPRESENTATIVE IN THE CLASS

1. THE DISCRIMINATION CLASS.

The Court has previously determined, in its December 1983 Statement of Decision, all of the facts and legal questions relating to plaintiff Woosley's unchallenged membership in the Discrimination Class. See S.D. pars. 4. 10, 215-222.

2. THE POST-1976 CLASS

Defendants argue at length that plaintiff cannot represent the Post-1976 subclass because he is not a member of the class. Defendants rely principally on *Trotsky v. Los Angeles Federal Savings and Loan Assn.* (1975) 48 Cal.App.3d 134, 121 Cal.Rptr. 637.

However, the reason behind the rule of *Trotsky* has been fully satisfied. The rationale of the *Trotsky* decision is that a representative plaintiff should be personally motivated to advance the claims of absent class members. Consequently, representative plaintiffs are frequently denied permission to advance class claims that they personally do not have. For instance, a representative plaintiff and all class members may share one cause of action against a defendant, but only the class may have an additional second cause of action. In such a case some courts have concluded that the representative plaintiff does not have sufficient personal interest in the second cause of action to permit him to pursue those claims on behalf of the class. These concerns are critical in a pre-trial setting, because the court must ensure that there will be no adverse impact on absent class members whose interests the representative plaintiff is to protect.

In the present context of the instant action that concern does not exist. Plaintiff has already vigorously advanced and prevailed on the merits of the Post-1976 claims. The *Trotsky* concern for adequate protection of the claims of the class has been satisfied. Plaintiff has won.

Defendants' reliance on *La Mar v. H & B Novelty & Loan Company* (9th. Cir. 1973) 489 F.2d 461, is also of no help. Central to the *La Mar* rationale is that the representative plaintiff personally have claims against all of the defendants sued. In other words, a class representative cannot bring an action against, for example, four defendants if the class representative only has claims against three of them -- even though the absent class members have claims

against all four defendants. the *La Mar* rationale does not apply here. Plaintiff has claims against all named defendants.

An additional and dispositive fact lays Defendants' contention to rest. Plaintiff Woosley is, *in fact*, a member of the Post-1976 class he represents. Exhibit 183 contains the registration records for two post-1976 vehicle transactions involving Woosley personally. In both of these transactions Plaintiff was assessed use taxes upon the impermissible purchase price criteria which this Court has found to be in violation of California law. S.D. pars. 124-213. Accordingly, Plaintiff is a member of the Post-1976 subclass.

Trotsky v. Los Angeles Federal Savings & Loan Association (1975) 48 Cal.App.3d 134, 146, states,

> It is the fact that the class plaintiff's claims are typical and his representation of the class adequate which give legitimacy to permitting him to bind class members who have notice of the action.

The typicality requirement does not dictate that the representative's claims be identical to those of the class as long as they are reasonably representative of the claims likely to be asserted by the class.

What the "typical claim" requirement does dictate is that the representative plaintiff have standing to make all of the arguments that can reasonably be made by the class, and press all of the causes of action that other members of the group could reasonably make. *San Jose v. Superior Court* (1974) 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701. See *LaMar v. H. & B. Novelty & Loan Company* (9th. Cir. 1973) 489 F.2d 461.

The cases finding that the representative plaintiff did not have claims typical of the class have involved situations where the representative plaintiff did not have standing to

raise a cause of action against the defendant. Woosley fully satisfies the standing requirements.

Even if Woosley were not qualified to represent *certain* members of the class, the proper course for the Court would be to order an additional representative plaintiff substituted in Woosley's place. *Lazar v. Hertz Corporation* (1983) 143 Cal.App.3d 128, 142, 191 Cal.Rptr. 849; *Scott v. City of Indian Wells*, supra, 550. See, also, *LaSala v. American Savings and Loan Association* (1971) 5 Cal.3d 864, 872, 97 Cal.Rptr. 849, 489 P.2d 1113.

VI.

ISSUE NO. 5: ABILITY OF THE CLASS REPRESENTATIVE TO FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS

1. AND 2. THE DISCRIMINATION CLASS AND THE POST-1976 CLASS.

During the several years pendency of this action plaintiff Woosley has clearly and convincingly demonstrated his ability to fairly and adequately protect the interests of the class. He has successfully litigated complex factual and legal issues and has prevailed on the merits at trial. He has committed energy and funds to this action far out of proportion to the amount of his own individual recovery. He has engaged experienced class action counsel who have vigorously and successfully litigated the complex factual and legal issues involved here. See, for example, Plaintiff's Trial Memorandum, the Statement of Decision filed in December 1983, Plaintiff's Motion for Class Certification and supporting memorandum, and Plaintiff's Reply to Defendants' Opposition to Class Certification.

Significantly, defendants have not even questioned Plaintiff Woosley's ability to fairly and adequately protect the interests of the class.

The Court finds not only that Plaintiff has that ability, but that he has fully, fairly and faithfully exercised it throughout these proceedings.

CONCLUSION

For the reasons and based upon the authorities cited above, the Court finds and determines that plaintiff has demonstrated by a preponderance of the evidence that this case should be certified as a class action.

DATED: November 13, 1984

/s/

Lester Olson

Judge of the Superior Court

sd-cert 3/24/93 22

APPENDIX F
ENTERED July 1, 1985

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CHARLES PATRICK WOOSLEY, individually and on behalf of all others similarly situated Plaintiffs, vs. STATE OF CALIFORNIA, et al. Defendants.	No. CA 000499 JUDGMENT Dept. 31

The court having previously determined liability in favor of plaintiffs and having certified this action as a class action,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That defendants Department of Motor Vehicles, Board of Control and the State of California refund all excess vehicle license fees or use taxes together with prejudgment interest thereon from dates of payment as provided by Civil Code Section 3287 and as otherwise provided by law, to all persons in the State of California who, from within three years prior to October 20, 1977 to the date of refund, were charged and paid more motor vehicle license fees or use taxes for registration of vehicles previously registered or titled outside of the State of California, because those fees or taxes were based on cost, rather than

on the statutorily presumed price under Revenue and Taxation Code Section 10753.

2. That defendants Board of Equalization and the State of California refund all excess use taxes collected, together with prejudgment interest thereon from the dates of payment of said excess charges as provided by Revenue and Taxation Code Section 6276.

3. That Class Counsel, the Law Firm of John F. Busetti and the law firm of Gansinger & Pick, recover as and for their attorneys fees rendered on behalf of the class, the sum of $12,000,000, payable out of the common fund recovered herein, as provided in paragraphs 1 and 2 above.

4. That former counsel, the law firm of Jones Bell & Simpson recover as and for their attorneys fees rendered on behalf of the class, the sum of $1,700,000, payable out of the common fund recovered herein, as provided in paragraphs 1 and 2 above.

5. That representative Plaintiff Charles Patrick Woosley recover as fees for services rendered as class representative, the sum of $1,000,000, payable out of the common fund recovered herein, as provided in paragraphs 1 and 2 above.

6. That plaintiffs recover costs from defendants, and each of them, in the sum of $8,323.89, which sum is to be reimbursed to Class Counsel.

DATED: July 1, 1985

/S/

LESTER E. OLSON

Judge of the Superior Court

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cl. 3 provides:

> The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

U.S. Const. amend. XIV, § 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution article III, section 3.5:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute has no power:
>
> (a) To declare a statute unenforceable, or to refuse to enforce a statute on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

California Constitution article XIII, section 32 provides:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

California Government Code section 910 provided that:

> A claim shall be presented by the claimant or by a person action on his behalf ....

California Revenue and Taxation Code section 10901 provides:

> Whenever the department [of Motor Vehicles] erroneously collects any license fee not required to be paid under this part, the amount shall be refunded to the person paying it upon application therefor made within three years after the date of the payment.

California Vehicle Code sections 42231-42232 read:

> § 42231. Whenever any application is made under this code and the application is accompanied by any fee which is excessive or not legally due, or whenever the department [of Motor Vehicles] in consequence of any error either of fact or of law as to the proper amount of any fee or any penalty thereon or as to the necessity of obtaining any privilege under this code collects any fee or penalty which is excessive, erroneous, or not legally due, the person who has paid the erroneous or excessive fee or penalty, or his agent on his behalf, may apply for and receive a refund of the amount thereof as provided in this article, or the department may refund the same within three years after the date of the payment or collection.

§ 42232. The application for refund shall be presented to the department in writing within three years from the date of payment of the erroneous or excessive fee or penalty ad shall identify the payment made and state the grounds upon which it is claimed that the payment was excessive or erroneous.

APPENDIX H

ENTERED JULY 25, 1992

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES PATRICK WOOSLEY, individually and on behalf of all others similarly situated, Plaintiff and Respondent	No. S014557
vs.	2nd Civil No. B015832
STATE OF CALIFORNIA, et al., Defendants and Appellants.	

REPONDENT'S PETITION FOR REHEARING

Introduction

This petition for rehearing will address (1) certain crucial facts omitted from this Court's opinion and (2) the federal due process violation which arises from this Court's surprising decision to reverse long-settled law on the availability of a class claim in a tax refund action. Further, perhaps due to the unusual procedural posture of this case with the most important issue being raised sua sponte by this Court after oral argument and despite the issues in this case being recognized as being "of substantial public importance" (opinion at 3), the opinion leaves a number of crucial questions unanswered, adopts arguments not anticipated by the parties, and includes some clerical errors.

I. Factual And Procedural Background

Unless a vehicle has been sold since July 1991, the Department of Motor Vehicles ("DMV") used and still uses a different and discriminatory system to value out-of-state vehicles for vehicle license fee purposes. This Court and the courts below held that this discrimination violates the Interstate Commerce Clause of the United States Constitution. (U.S. Constitution, art. I, §8, cl. 3.)

The Court of Appeal and the Superior Court also held that the legislative intent of Revenue and Taxation Code §6276[1] was for DMV to use the formula contained in §6276 to compute the use tax on vehicles purchased from private parties and that the DMV was not authorized to require taxpayers to certify the cost of vehicles purchased from private party sellers. The courts below found this legislative intent from the conditions of the times when the section was enacted, the evolution of the statute, its contemporaneous administrative interpretation by DMV, the refusal of the Legislature to repeal the section in 1971 and the legislative history in 1971 when the formula was modified. (CT pp. 950-953, 957, 1012; RT pp. 44-45; majority opinion of the Court of Appeal at pp. 20-22, 24; conc. opn. of Boren, J. at pp. 2-3.) Recently, the Legislature repealed the section with the specific operative date of August 1, 1991. (Stats. 1991, ch. 87, §1, p. 307.) This Court disagreed with the statutory construction of the courts below and reversed on October 26, 1992.

This case was argued orally on June 3, 1992 and on June 25, 1992 the Court requested additional briefs on an issue that had never before been raised by any party in the fourteen year history of the Litigation. This Court requested

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1. All section references are to the Revenue and Taxation Code unless otherwise cited.

supplemental briefing on whether class claims for refund of taxes are authorized, but none of the parties anticipated some of the theories adopted by the opinion. No oral argument was heard after the supplemental brief were filed. The Court then based a decision which threatens to deprive California citizens of the right to recover monies unconstitutionally taken from them on an issue never before raised and not litigated by the parties.

This action was filed in 1978 as, and certified in 1984 as, a class action based on several class claims for refund. Although the DMV and the Board of Equalization ("Board") made various arguments against the class claims, they never questioned the fundamental premise that the class claims for refund of taxes were authorized. This Court reversed and ruled that class claims for the refund of use taxes were not authorized by the Legislature until 1988, and were never authorized for vehicle license fees. Further, this Court ruled that California Constitution article XIII, section 32 prohibits this Court from recognizing substantial compliance with the statutory tax refund procedures, and that the Legislature did not authorize class claims for tax refunds. Therefore, this Court ruled generally that each taxpayer has to file a timely individual refund claim and that the holding is retroactive.

II. This Court's Holdings That (1) A Representative's Class Claim Cannot Be The Foundation For A Tax Refund Class Action And (2) That Notice Need Not Be Given To Persons Who Are Entitled To A Tax Refund Result In A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.

In essence, this Court's opinion holds that although millions of this state's taxpayers have been illegally over-

charged on vehicle license fees and use taxes, they can not participate in this class action unless they previously filed a claim, and have no right to be notified that they are entitled to a refund.

Prior to this Court's request for supplemental briefing subsequent to oral argument, the issue of whether a class claim may be used in a tax refund action had been considered so well settled that no party or court had raised it during 14 years of this litigation. In response to this Court's question, the class members and individual class representative filed supplemental briefs which raised the Due Process implications of a holding that a class claim is unavailable. (See Respondents' Supplemental Brief Pursuant to Order of June 25, 1992 at pp. 16-17 and the Supplemental Brief of Individual Respondent on Class Claims at pp. 8-9.) This Court's opinion, however, omits any discussion of the Due Process Clause.

As stated in the foregoing pages of Respondents' Supplemental Brief: "The Supreme Court made it clear in *McKesson Corporation v. Div. of Alcoholic Beverages and Tobacco* (1990) 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17, that when a state deprives a taxpayer of pre-payment remedies, as California does in Cal. Const. Art. XIII, Section 32, the Due Process Clause of the Fourteenth Amendment requires the state to provide effective post-payment relief." By denying the class members here the right to proceed via a class claim, while simultaneously holding that there is no requirement that they be notified of their right to file individual claims, this Court has effectively ruled that the state has illegally collected the class members' money but does not have to refund it. Without the protection of membership in a class, numerous people may never become aware of their right to a refund. The withdrawal of a viable, necessary mechanism for post-payment relief consti-

tutes a violation of the Due Process Clause, United States Constitution, Fourteenth Amendment, section 1.

Furthermore, due process considerations were clearly implicit in this Court's opinion in *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790. *Javor* was a class action for refunds of sales tax reimbursements (which case, it should be noted, was heavily relied upon in the briefing but scarcely mentioned in this Court's opinion). *Javor* held that the state is the constructive trustee of any erroneously collected taxes, and is obligated to refund them to avoid unjust enrichment and ensure the integrity of the tax system. (12 Cal.3d at pp. 798-802). *Javor* shows an admirable lack of any propensity in 1974 for this Court to favor the tax authorities, a neutrality which is just as important to the integrity of the legal system now as it was then. If the state has no obligation to inform taxpayers that they are entitled to a refund, it is obvious that the state will be unjustly enriched and the integrity of the tax system seriously jeopardized. When the state knows of underpayments, the state immediately informs taxpayers. What right does the state have to avoid informing taxpayers when they have overpaid and the amount of the overpayment is readily apparent from the state's records?

Finally, this Court's decision to reach the issue of notice, and find no need for notice, while refusing to decide the issue of tolling, raises additional due process problems. This Court's opinion means that millions of people who were class members for years have suddenly been excluded from the class because nobody suspected that the filing of an individual claim up to sixteen years ago was a prerequisite to class membership. Since this Court has ruled that no notice is necessary, there is a likelihood that some putative class members will never learn of their right to refunds until the statute of limitations has expired. These putative class members will be in the position of having overpaid

their taxes, with no opportunity for refund. Either possibility represents a violation of a taxpayer's right under *McKesson* to effective post-payment relief of an improperly paid tax.

III. This Court's Construction Of The Use Tax Statute, Section 6276, Omits The Fact That Section 6276 Had Purposes Other Than Administrative Convenience, Even Though The Trial Court And Court Of Appeal Considered These Other Purposes Significant.

The Court's opinion states that plaintiff has suggested no plausible purpose for the presumption of section 6276 and the opinion adopts the DMV's suggestion that the sole purpose of section was for DMV's administrative convenience (opinion at 43); however, individual plaintiff's Answer Brief On The Merits (Reprinted) ("Answer Brief") identified and documented several other important purposes. (See, e. g., Answer Brief at pp. 13-14, 24.) The courts below considered these purposes significant and plausible. (See, e.g., CT 955 ¶ 148 (reducing cheating), CT 1011 ¶ 334 (purpose of reducing cheating made the presumption one establishing burden of proof) and Court of Appeal Opinion at 22 (reduced burden of tax on taxpayers).)

First, the presumption mitigates the discrimination against voters who purchased vehicles compared to purchasers of other items of tangible personal property; other items of tangible personal property are tax exempt if purchased from a private party. It eased the transition from private party vehicle sales being exempt to their being discriminated against. (See, Answer Brief at pp. 12-13.)

Second, the presumption makes it more difficult and less attractive for purchasers in private party transactions to lie about their purchase price. (CT 955 ¶ 148, 1011 ¶ 334.)

The trial court sua sponte commented on the tendency of private parties to lie in these matters. (RT 46:11-18.) The presumption placed the psychological burden and the burden of proof on the motorist to show that the actual purchase price was less than the presumed price. (See, CT 955 ¶ 148, 1011 ¶ 334.) If the DMV clerk told a taxpayer "Our tables show that the value of this vehicle is $2000." the motorist who actually paid $2100 is much less likely to lie and say it cost him $1500 than if the DMV did not have a benchmark value.

IV. This Court's Statutory Construction of Section 6276 Ignores The Conditions Of The Times When The Section Was Enacted, The Evolution Of The Section, And Particularly The Legislative History In 1971 When Section 6276 Was Amended In Face Of A Board Effort To Have It Repealed.

The conditions of the times, the evolution of the statute and the legislative history in 1971 show that the legislative intent did not authorize DMV to require cost certificates. Section 6276 was enacted in 1965 when the occasional sale exemption was removed from most private party sales of vehicles. The occasional sale provisions exempted and still exempts private party sales of most other kinds of tangible personal property such as rare books, art and horses. (§§6282, 6367; see, Answer Brief at 12-13.) Originally the predecessor of §6276 applied only to out-of-state vehicles and was irrebuttable. (CT 950 ¶¶ 130-131.) It was made rebuttable in response to complaints from the few people to whom the presumption was unfavorable when the provision was extended in 1965 to the hundreds of thousands of purchases of used California vehicles each year. (See, Answer Brief at 14.) The requirement of cost certificates is an ad-

ministrative shift of the burden of proof. (See, Answer Brief at 20-22.)

When the 1971 amendment was enacted, the legislative history lucidly showed that the Legislature intended (at least from 1971 forward) that only the motorist be able to rebut the presumption:

The Assembly Committee On taxation stated:

> "Under current law, DMV [presumed] value is used as the basis for the sales price in computing the use tax." (Assembly Committee On Taxation Analysis of AB 2109 dated June 14, 1971) reproduced at Court of Appeal Appendix p. 1, Background, Par. 1.

The Legislative Analyst described the law:

> "The tax is computed on the basis of the market value schedule used by [DMV] for calculation of motor vehicle license fees rather than being based on the actual sales price." (Legislative Analyst's report Analysis of Assembly Bill 2109 (Bagley, as amended in Senate September 20, 1971), reproduced in Court of Appeal Appendix, p. 6 Par. 1, first subparagraph.

The Senate Committee on Revenue and Taxation Analysis of Bills For Hearing observed:

> "As under current law, if the actual sales price is less than the presumed value, the taxpayer, by stating the actual value, will pay the tax on that value." (Senate Committee of Revenue And Taxation Analysis of Bills For Hearing September 22, 1971, reproduced at Court of Appeal Appendix, p. 4, Background, second paragraph.)

The statement (opinion at 40) that the Legislature would have said so if it intended that only one party could rebut the presumption ignores this legislative history which makes clear that the Legislature intended that only the mo-

torist to be able to rebut the presumption. It would be most unusual for the Legislature to say this much but not say that the DMV could also rebut the presumption if that were what was intended.

The Legislature endorsed and relied on DMV's contemporaneous interpretation in 1971 when it modified §6276 to raise taxes by 20% for automobiles (instead of repealing the section) to attain the revenue goal projected by the Board from a repeal of the section. The Legislature understood that everybody interpreted the language to allow only the taxpayer to rebut the presumption. The very foundation for the Legislative change was its expressed understanding of how the rebuttal sentence applied -- only the taxpayer could rebut the presumption. It would be anomalous if DMV or the Board were permitted to interpret the language the exact opposite of the way the Legislature interpreted it when the Legislature modified the section in 1971. To have modified the presumed value and to have intended to allow DMV to rebut the presumption in every case would have been contradictory. DMV's contemporaneous administrative construction of the statute was validated by the legislative reenactment doctrine. (See, Answer Brief at 16-17.)

Standing alone, the failure of the Legislature to repeal the section in 1971 would not have been controlling, but cumulative with the DMV's contemporaneous administrative interpretation, the legislative history, the conditions of the times when it was enacted and evolution of the section, the Legislature's action would be controlling under the traditional tools of statutory interpretation. Importantly, the amendment was grounded on the Legislature's interpretation in 1971 of how rebuttal worked, so the legislative history is a strong indicator of legislative intent for the periods after 1970.

The opinion makes a number of statements which will have unintended impact and foster significant additional litigation if not explained.

The opinion states that the Legislature's repeal in 1991 of §6276 supports the conclusion the Legislature did not (in 1965 or 1971) intend that DMV be barred from demanding cost certificates. (Opinion at 43-44.) This argument (which was not raised by the state and not briefed by the parties) appears to be in fundamental conflict with the cardinal rule that a Legislature cannot retroactively create legislative intent. (*Consumer Product Safety Commission v. GTE Sylvania* (1980) 447 U.S. 102, 117; cf. *Clements v. T. R. Bechtel Company* (1954) 43 Cal.2d 227, 231-233.) The opinion also did not reconcile this statement with the legislative history and the specific operative date of the 1991 amendment which support DMV's original, contemporaneous interpretation and indicate that a change was being made.

Most people would interpret the Legislature's 1991 repeal of §6276 *with the specific operative date of August 1, 1991*, as an action to keep the state's potential liability from continuing to grow, not an attempt to retroactively validate the DMV's prior actions. The Legislature was faced with a decision of the Court of Appeal herein that the section was being interpreted improperly and faced by assertions by DMV and the Board to this Court and in the State of California's published financial statement that the state's and local governments' exposure was growing rapidly each day.

V. A Rehearing Should Be Granted On The Class Claims Issue Because A Substantial Part Of The Opinion's Reasoning In Outlawing Class Claims Was Unanticipated By The Parties.

Even though this Court requested supplemental briefing on availability of class claims for refund of taxes, none of the parties and none of the amici curiae *anticipated* substantial portions of the opinion's logic overruling the prior Court of Appeal decisions on point. Since we did not anticipate these theories, they have not been honed by the adversarial process. Adopting these arguments without an opportunity for response violates the spirit of Government Code §68081 which requires that all significant arguments be briefed by the parties.

The opinion reasons that Revenue and Taxation Code §§6906 and 6486 (as they appeared in 1977) demonstrated a legislative intent not to allow class claims for the return of illegally collected use taxes. (Opinion at 49.) However, the opinion does not reconcile this reasoning with the fact that neither section has been amended now that class claims for refund of use tax are specifically allowed by statute.

The striking similarity between the approach taken in the amended claim statutes and 18 CCR §5057.5 suggests an evolution, and that regulation specifically recognized that class claims for the refund of taxes were allowable.[2] Why does not the legislative reenactment doctrine ratify the decisions of the Court of Appeal and the tax agencies that class claims are allowed?

The opinion leaves unanswered how a trustee can unjustly enrich itself by an ambiguous technicality at best. This Court held in *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, 795, that the Board held overcollections of sales tax in constructive trust for the people who had paid the sales tax reimbursements to the retailers and

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2. The regulation was promulgated after the claims herein and the instant action were filed, so it does not limit the claim underlying this action.

could not unjustly enrich itself. It would be highly anomalous for the people to whom retailers had by contract passed on the economic burden of sales tax to have greater rights than the payers of use tax, particularly when the challenged taxes have been found to be unconstitutional.

With respect to the vehicle license fee claim statute, the opinion states for the first time that only the payor or the payor's agent may file a claim and that the class representative herein is not the payor's agent because there was no knowledge or consent. (Opinion at 48.) However, the opinion does not answer the fundamental question of why an agency has not been created by ratification, which should be implied under these circumstances. Section 2307 of the Civil Code allows creation of an agency by ratification. There is no plausible argument that the class members have not by implication ratified the agency. At least as of the last date for filing a claim for refund, a taxpayer has nothing to lose and everything to gain by ratification of the claim filed on his or her behalf. Alternatively, the taxpayers should be given a reasonable opportunity to satisfy this newly discovered procedural requirement to affirmatively ratify the agency. Lack of ratification was raised for the first time in the opinion.

The very foundation of the opinion's conclusion that it must disapprove the square holdings of several divisions of the Court of Appeal and distinguish this Court's holding in Javor, supra, is the argument that California Constitution article XIII, §32 prohibits this Court from granting tax refunds except in the precise manner provided by the Legislature; however, this analysis leaves unanswered many questions. The opinion does not explain how this can possibly be the correct interpretation of the voter proposition when it flatly contradicts the California Voters Pamphlet. The pamphlet said that section 32's rewording was a nonsubstantive change which would not raise revenue

(California Voters Pamphlet, General Election November 5, 1974, pp. 30-31), yet the opinion uses the wording change as the keystone of what effectively is one of the largest tax increases in California history.

Neither does the opinion explain how its interpretation can be reconciled with the obvious due process violation if the Legislature provided no "manner" for tax refunds. A grossly impractical manner is essentially the same as the Legislature providing no manner at all.

Further, the opinion does not explain why it apparently applies the constitutional provision to the local use taxes. Article XIII specifically does not apply to subdivisions of the state, and the state is not being enjoined here. The situation in *Pacific Gas & Electric Co. v. State Board of Equalization* (1980) 27 Cal.3d 277, is highly distinguishable because the taxpayer there was attempting to enjoin the Board from carrying out a constitutional duty even though the duty was for the benefit of local governments. Here, there is no injunction proposed against any entity and the DMV and the Board are merely acting as agent for the local entities in respect to the local use taxes. California Constitution article XIII, section 32 has no application to refunds of these taxes.

VI. Typographical Errors, Dicta And Peripheral Matters

In the data sheet attached to the opinion, the name of class counsel James M. Gansinger is misspelled and his address is incorrect. The correct address is 355 South Grand Avenue, 29th Floor, Los Angeles, CA 90017.

The opinion incorrectly assumes that the three year period mentioned at footnote 14 (page 18) represents the use tax limitations period. The statute of limitations for use tax has not been briefed by the parties and any holding on the issue would be dicta in light of this Court's other rulings.

The beginning date in the class description was suggested by plaintiff because it is three years prior to the vehicle license fee claim (the vehicle license fee statute of limitations), and plaintiff decided not to complicate the class management by suggesting a different starting date for use tax. In all relevant cases the use tax statute of limitations is not less than three years. The class definitions commencing the class three years before the claim filing was adopted by the trial court without discussion, and has not been appealed. Reference to §6902 in footnote 14 suggests that this Court has generalized about the statute of limitations for use tax; however, the limitations period is difficult about which to generalize and such a generalization serves no purpose here. This should be clarified.

We also suggest that this Court clarify or remove its references to the 1983 vehicle license fee changes because some of the opinion's comments might be improperly read as holding that the vehicle license fee discrimination does not affect vehicles first new sold after September 1983, typically post-1983 model vehicles. (Opinion at 12 and 17.) This confusion might have been caused by an error in Respondent's Opening Brief On The Merits which was called to this Court's attention in the Respondent's Response To Amicus Curiae Brief of County Supervisors Association And Named California Counties at page 3, footnote 1. See also, Answer Brief at pages 18-19. Discrimination against out-of-state vehicles is caused (1) by different treatment of options prior to the 1984 model year, and (2) by DMV utilizing the price paid by the first person to register a used vehicle in California and that person's date of purchase in the vehicle license fee value formula rather using the vehicle's price new and date of sale new as DMV did for California vehicles. The aspect of the discrimination caused by the different treatment of options ended for vehicles first sold new after that date, but the discrimination

caused by utilizing a used vehicle price for out-of-state vehicles and a new vehicle price for California vehicles, and by the different starting dates for the depreciation continue until the vehicle is sold outside of the seller's immediate family after July 31, 1991, even if the vehicle is a post-1983 vehicle.

The opinion makes no reference to the cost award in the trial court. We submit that costs should be handled in a manner consistent with the fee awards.

Conclusion

For the reasons above, an oral rehearing is respectfully requested.

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EXHIBIT I

ENTERED JULY 24, 1992

IN THE SUPREME COURT OF CALIFORNIA

CHARLES PATRICK WOOSLEY, individually and on behalf of all others similarly situated Plaintiffs, vs. STATE OF CALIFORNIA, et al. Defendants.	No. S014557

SUPPLEMENTAL BRIEF OF INDIVIDUAL RESPONDENT ON CLASS CLAIMS

ISSUE PRESENTED

This Court ordered briefing on the issue of "whether a class claim may be used to seek a refund of taxes."[1]

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1. Since this action covers taxes which are imposed by transaction (on purchase or by year for each vehicle), we have not addressed the special problems of class claims with respect to refund of income taxes which are imposed on the total income of a tax year.

Several of the arguments supporting class claims would be significantly enhanced by facts which were omitted from the record in reliance on the fact that the agencies endorsed the class claim concept, undoubtedly in reliance on Code of Civil Procedure section 382 and *Javor* et al., just as respondents so relied. The weighing for Due Process, the burden on interstate commerce, and policy arguments herein would have been further supported in the factual record had the agencies timely questioned precedent.

A fair analysis of the class claim concept would require the review of controverted facts; new issues requiring consideration of controverted facts are not considered on appeal. *Bogacki v. Board of*

FACTUAL AND PROCEDURAL BACKGROUND

Unanimously, the courts below found that the calculation of vehicle license fees (and until November 15, 1976, the use tax) on out-of-state vehicles violates the statutes and the Commerce Clause of the United States Constitution. The trial court also found Equal Protection grounds, but the Court of Appeal did not reach that issue. The trial court and the majority of the Court of Appeal also held that the system of the Department of Motor Vehicles ("DMV") and the State Board of Equalization ("SBE," collectively, "the agencies") for calculating use tax on used vehicles purchased from private parties violates the legislative intent of the applicable Revenue and Taxation Code ("Rev. & T. Code") section. The legislative intent is shown by the evolution of the section, its legislative history, the refusal of the Legislature to repeal it until 1991, and the contemporaneous interpretation of DMV (which is responsible for the administrative machinery to implement the statute). The lower courts held that the only putative authority for a reversal of DMV's long-standing contemporaneous interpretation of the use tax on California vehicles was a 1976 agreement which violated the Administrative Procedure Act.

Explicitly labeled class claims for refund were filed October 20, 1977, amended in March 1978, and denied by the agencies. Opinion of the Court of Appeal at 30. Liability was determined first, two sub-classes were certified, and judgment was rendered in 1985. The Court of Appeal affirmed in January 1990, and oral argument in this Court was June 2, 1992.

Supervisors (1971) 5 Cal.3d 771, 780; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 873-74 (Appellant's failure to argue a theory in the trial court waived appellant's argument of that theory on appeal).

I. THE PRIMARY REASON THAT A CLASS CLAIM MAY BE USED TO SEEK A REFUND OF TAXES IS CALIFORNIA'S LONG HISTORY OF ENCOURAGING TAX CLASS ACTIONS, HISTORY UPON WHICH ALL PARTIES RELIED.

In *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447 ("*San Jose*"), this Court encouraged class tort claims against governmental units. In *Javor v. State Board of Equalization* (1974) 12 Cal.3d 790, this Court ruled in favor of a class of taxpayers against one of the appellants here (SBE) in a class action, describing SBE as a "constructive trustee" of the over-collected taxes (12 Cal.3d at 795) and holding:

> If a class suit were not permitted, a multiplicity of actions will be necessary in order to effectuate recovery by the initial purchasers. Since, in many instances, the small amount involved may discourage an individual action as economically impractical, the state would be unjustly enriched, if a class suit were not permitted." 12 Cal.3d at 797.

The policy behind class claims for refund is even stronger in tax cases than in tort cases because tax cases involve a "taking" under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and damages caused by negligence do not. *Parratt v. Taylor* (1981) 451 U.S. 527, 537-39.

The Court of Appeal in *Santa Barbara Optical Company, Inc. v. State Board of Equalization* (1975) 47 Cal.App.3d 244 enthusiastically followed *San Jose* and *Javor*, and elaborated on the policy reasons supporting the use of class claims to secure the refund of taxes. Below, these three cases are sometimes referred to as "*Javor* et al."

There is no plea from any party to overrule *Javor* et al., and there are no facts in the record or conditions extant generally which call for (or even justify) such overruling. An overruling of *Javor* et al. would, therefore, be anathema under *stare decisis*. These class action decisions are entitled to the highest degree of respect here under *stare decisis* because of reliance. Class representative Woosley worked as a lawyer on an unrelated tax class action prior to filing the instant class claims (CT 3160), appellant SBE was defendant in *Javor* and *Santa Barbara*, and the same Deputy Attorney General tried *Javor*, *Santa Barbara* and instant case. Remedial action here, if any, should be taken by the Legislature. The agencies have not sought the overruling of *Javor* et al., nor is there any fact or circumstance in this record which would justify overruling these clear and long-standing precedents in view of the restraints of the doctrine of *stare decisis*. Neither has there been any suggestion in this record that general conditions support such overruling, nor can Woosley perceive of any such facts or conditions. In the absence of such facts of record, or general conditions of which this Court has taken judicial notice, the doctrine of *stare decisis* restrains courts from overruling a clear and long-standing precedent. Under such circumstances, the Legislature should be the body to change the law. *Edwards v. Pacific Fruit Express Co.* (1968) 390 U.S. 538, 543 ("Under these circumstances, we do not think this Court should depart from 60 years of history to do what is a job for Congress."). See, *City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199.

The burden of adducing facts or conditions adequate to support reversal in the face of the doctrine of *stare decisis* is upon those advocating such reversal. No such showing has been made in the record. Therefore, no such reversal should be made by any court.

Nevertheless, for the sake of completeness, below are several additional reasons why the long-standing precedent should be followed.

II. THERE ARE LIMITS TO THE BARRIERS THAT STATES CAN ERECT AGAINST TAX REFUNDS, AND ANY FURTHER BARRIERS HERE WOULD EXCEED CONSTITUTIONAL LIMITS.

A. Background

There is a limit to the barriers which states can erect to taxpayers' Means of Redress. A right without a meaningful remedy is no right at all. Herein, we use the expression, "Means of Redress" to denote the when, where, how and from whom, a taxpayer gets over-paid taxes back.

In this section, we will first put barriers to taxpayer's Means of Redress into context by reviewing some of the ways in which tax authorities have stacked the deck in their own favor. Second, we will demonstrate that there are limits to the barriers which the agencies can legally erect to protect themselves from refunds. Finally, we will explore the applicable principles and demonstrate that an unavailability of the right to class claims for refund here would impose an unreasonable burden on interstate commerce, and would violate Due Process of Law.

Constitutions, legislation and jurisprudence have already stacked the deck significantly in favor of tax authorities and against taxpayers. Injunctions against collection of taxes are forbidden by California Constitution article XIII, section 32, no matter how outrageous the tax assessment is. Despite the general rule under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the availability of predeprivation challenges to the collection of taxes is not constitutionally required. *Fuentes v. Shevin* (1972) 407 U.S. 67, 90-92. In a refund action,

the taxpayer has the burden of proof. Taxpayers are required to set forth their grounds for refund in a claim for refund (Rev. & T. Code sec. 6904) but the tax agencies feel that they can raise their arguments at any time they get around to it, even on appeal and even after briefs are filed (See the letter to the Court of Appeal one week before oral argument). A taxpayer who cannot afford to pay all of an assessment will never have a remedy. *Flora v. United States* (1960) 362 U.S. 145. See, *Masi v. State Board of Equalization* (April 27, 1992) 92 Daily Journal D.A.R. 5596, petition for review filed.

Any suggestion that class claims for refund of taxes are not allowed has to be evaluated as a barrier to justice cumulative to the barriers already existing. If left unchecked, California tax agencies will be tempted to follow other state tax authorities which are attempting to utilize additional unfair tactics to further stack the deck in their favor and depreciate the taxpayer's Means of Redress. The Texas Supreme Court held a tax unconstitutional but further ruled that its holding is not apply to taxes which have been paid or will be paid for the next 18 months. *Carrolton-Farmers Branch Independent School District v. Edgewood Independent School District* (Tex. January 30, 1992) Slip Op. at 5-17. A federal District Court [held it could but did not issue] an injunction based on the Texas Supreme Court's extinguishment of the taxpayers' Means of Redress. *Smith v. Travis County Independent Education District* (W.D. Tex 1992) 1992 WL 92574, pp. 11-14, [reversed 968 F.2d 453 (5th.Cir. 1992)].

An argument that class claims for tax refunds are not available here is analogous to various devices to depreciate taxpayers' Means of Redress which have been struck down. Non-discrimination against interstate commerce means more, at least in the tax context, than just paying the same tax on out-of-state goods as paid on local goods. Equality

is not just a destination, but a journey as well. Ancillary and procedural rights are also constitutionally protected.

States are under strong political pressures to raise revenues in the most painless ways, to discriminate against unpopular groups, and to discourage lawful activities which disfavor local interests (the same interests that keep legislators and bureaucrats in power). *New Law, Non-retroactivity, and Constitutional Remedies*, 104 H.L.R. 1731, 1831. To do so, groups might be improperly targeted based on race, religion, length of residence, ownership of goods from other states, or many other factors which are politically acceptable at the time, even though improper. Faced with such pressures on the one hand, and the well-known substantive rulings of this Court and the U.S. Supreme Court against discrimination on the other hand, it is natural for states to reduce taxpayers' Means of Redress to evade the Courts' decisions against substantive discrimination. Procedural discrimination is often more effective in achieving the unconstitutional objectives than substantive inequality. Burdensome administrative procedures furthering discrimination against interstate commerce can be a more effective barrier against out-of-state goods than a substantive barrier.

Among possible strategies which a state might consider are:

1. Over-collecting taxes from the targeted group, keeping the taxes for years and refusing to pay interest on refunds, or paying less interest on refunds than the state earns from investing the money.

2. Systematically using procedural rules or administrative proeedures to discourage the targeted class from achieving equality. For example: a) refusing to make retroactive refunds of taxes after they are ruled unconstitutional, b) requiring useless administrative claims to agen-

cies which cannot or will not rule (especially on constitutional issues), c) imposing the burden of proof on the targeted class when the untargeted groups bear no such burden, d) requiring the targeted group to sue for refunds where the law is known to be unconstitutional, e) pursuing unjustified appeals (as a stratagem), f) specifying that the only way the targeted group can achieve equality is for it to force a change in the treatment of the untargeted group. See, e.g., *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* (1990) 496 U.S. 18, 110 S.Ct. 2238. An example might be to require those paying more taxes than their counterparts to bring the rates paid by their counterparts up to the targeted group's level in order to achieve equality (rather than requiring the tax agency to refund the difference).

The list could go on and on, but many of these discriminatory schemes have been struck down. The U.S. Supreme Court ordered payment of market rate interest rather than the lower statutory interest rate in *Maryland v. Louisiana* (1981) 451 U.S, 725, a Commerce Clause case. Order, 425 U.S. 456, 457. The principle also applies to Due Process cases. Governments cannot take the use of property (such as money) without just compensation, any more than title to property. Cf., *Kimball Laundry Co. v United States* (1949) 338 U.S. 1. This Court has ruled similarly. *Redevelopment Agency of Burbank v. Gilmore* (1985) 38 Cal.3d 790, 797. A forced interest-free loan is often enough to discourage the illegally targeted activity.[2]

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2. California has exacerbated the unconstitutional inequity concerning interest effective August 1, 1991 by lowering the interest rate SBE pays on refunds of sales and use taxes to approximately the rate paid on federal treasury bills, but charging 13% on deficiencies. Rev. & T. Code sec. 6591.5. The federal treasury bill rates are not appropriate. First, treasury bills are issued for fixed, short-term periods of time, and there is an active resale market. Interest on sales and use tax

This Court effectively agreed that workable Means of Redress had to be made available, in *Javor v. State Board Equalization* (1974) 12 Cal.3d 790, 795, 797. This Court there called SBE a "constructive trustee," held that SBE would be unjustly enriched if a class action were not allowed, and crafted a remedy in a class action for those who had paid sales tax on a cancelled federal excise tax. SBE refused to initiate refunds on the pretext that the retailers (who had no financial interest in doing so) had to initiate the refunds.

Taxpayers whose property is taxed at full value while others are systematically taxed at less than full value cannot, in their means of achieving equality be limited to the impossible task of bringing taxation of the majority up to the minority's level. *Allegheny Pittsburgh Coal Company v. Webster County.*(1989) 488 U.S. 336, 109 S.Ct. 633, 639. The Court in *McKesson, supra*, held that when the tax authorities choose to eliminate discrimination by raising the taxes of others, it was the state that has to do so and not the taxpayers discriminated against. 110 S.Ct. at 2252.

Not many members of an unconstitutionally targeted group would vote if they had to lend the state $1,000 for a year to qualify, much less 15 years. A token tax on the right to vote was held unconstitutional. *Harper v. Virginia Bd. of Elections* (1966) 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169.

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overpayments is for an unpredictable period of time, and the "loan" is not assignable. Second, interest on treasury bills is free from state income tax while interest on tax refunds is fully taxable by both state and federal governments. Finally, the credit of the United States is considerably stronger than the credit of the State of California. This low rate of interest violates the Due Process Clause and imposes an unreasonable burden on interstate commerce for the reasons herein.

Undoubtedly this Court would, in short order dispense with a scheme which intentionally and unconstitutionally targeted a suspect class for a discriminatory tax, denied prepayment remedies, imposed a very short statute of limitations on claims for refund, and made the claim process unnecessarily expensive, complicated and slow, imposed large discriminatory filing fees, saved all of the agency's arguments for the last minute, and took 15 years to return the money. The instant case is, of course, not as egregious as the hypothetical example, but as detailed in prior briefs, the agencies here knew that they were discriminating against interstate commerce, have continued to raise untimely new arguments, proposed unnecessarily complicated refund plans, and in their prior arguments, intentionally increased the apparent size of the potential refunds in an attempt to use scare tactics to influence the courts.

Not every burden on targeted groups' Means of Redress is forbidden but unreasonable burdens are. The subsections below show that any overruling of *Javor* et al., would cumulatively be an unreasonable burden on commerce, and would violate Due Process of Law.

B. Under The Facts Of This Case, Abandonment Of The Class Refund Claim Concept Would Be An Unreasonable Burden On Interstate Commerce.

Our previous Commerce Clause briefs focused on facially discriminatory taxes to which a virtually per se rule of invalidity applies; in contrast, the instant discussion focuses on facially neutral limits on taxpayers' Means of Redress which place an unreasonable burden on interstate commerce. A completely different standard applies in the later situation, one which is admittedly easier for the tax authorities to meet. However, cumulatively with the intentional discrimination and the other administrative barriers

here, elimination of class claims for refund of taxes would be clearly excessive and violate even the looser standard.

When a provision is not facially discriminatory, the courts weigh the valid concerns of the state against the demand for a vibrant, safe, fair and efficient flow of interstate commerce, in order to ascertain whether the state provision impermissibly burdens interstate commerce. One situation where the provisions are struck down frequently, is where the asserted benefits of the provision are illusory or relate to goals that evidence an impermissible favoritism for in-state industry. Both are present here.

Several cases have found that administrative barriers placed an impermissible burden on interstate commerce. One case striking down non-tax administrative barriers on Commerce Clause grounds is *Edgar v. Mite Corp.* (1982) 457 U.S. 624, where the Court used the Commerce Clause to rule unconstitutional the administrative requirements imposed by Illinois to tilt the playing field in favor of local target companies in takeover battles. A company making a tender offer had to register the offer with the state, and could not communicate the offer to the target company's shareholders for 20 days; however, the target company itself was free to communicate with its shareholders about the offer at any time. The court held that this distinction was at variance with the purported objectives of the legislation, and was unconvinced that the Illinois provisions substantially enhanced the shareholders' ability to make an informed decision. The court was also critical of the extra-territorial effect of the statute. There is an extra-territorial effect in this case as well: A California buyer subjected to administrative barriers to achieve equal taxes on an out-of-state vehicle was less likely to purchase an out-of-state vehicle, and an out-of-state resident is less likely to move here with his or her current vehicle because the new resi-

dent would be paying more vehicle license fees than owners of comparable California vehicles bought at the same time.

Bendix Autolite Corporation v. Midwesco Industries, Inc. (1988) 486 U.S. 888, 889, held that a provision tolling a statute of limitations, when an out-of-state corporation had no agent for service of process in the state, violated the Commerce Clause.

The landmark case is *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142, where the federal Supreme Court held unconstitutional an Arizona statute that prohibited melon growers from shipping produce before packing them, because the burden on commerce was excessive in relation to the putative local benefits. The statute was struck down because it had the effect of barring the grower from shipping its melons to California for packing. In *Hunt v. Washington State Apple Advertising Commission* (1977) 432 U.S. 333, the court ruled a facially neutral law to discriminate against interstate commerce. The North Carolina statute prohibited the display of state apple grades on containers. The result was that apples from the State of Washington, which had a highly respected grading system, had to enter North Carolina at a disadvantage. The Court found that the statute deprived consumers of any information on the quality of out-of-state apples rather than protecting consumers from alleged confusion resulting from varying grading systems. Thus, the prohibition on grades undermined the stated consumer protection objective, and caused local consumers to be less likely to buy out-of-state apples. In *Raymond Motor Transportation, Inc. v. Rice* (1978) 434 U.S. 429, 669-79, the court again invalidated a nondiscriminatory truck-length statute based on its negative impact on interstate commerce. Cf., *Kassel v. Consolidated Freightways Corp. of Delaware* (1981) 450 U.S. 662.

As detailed in prior briefs, DMV and SBE have already subjected the instant class members to burdensome administrative barriers, and the burden should not be exacerbated by subjecting the taxpayers to the additional burden of individual refund claims, even if they would still be timely. Here, as detailed in prior briefs, DMV and SBE refused to license vehicles unless the owners of out-of-state vehicles paid a facially discriminatory vehicle license fee, and constantly nitpicked the grounds for refund specified in the claims. In addition, DMV and SBE have rested much of their case on scare tactics, focusing on the amount of money involved. (RT 113:16 to 114:3.)

As a result of this series of actions, each tilting (or attempting to tilt) the playing field further in favor of the agencies, the victims of discrimination against interstate commerce here have already been denied an efficient method of redressing the discrimination, and they have pursued a method which, through no fault of the respondent sub-classes, has proved remarkably slow and ineffective (the class claims were filed in 1977). Any further barriers would eliminate any question whether there was an unreasonable burden on commerce.

A fair way to put the issue into the proper light is to contrast the miniscule size of the legitimate benefits of requiring individual claims, to the magnitude of the potential unconstitutional unjust enrichment. Here, if this Court were to overrule *Javor* et al., the agencies are much more likely to be unjustly enriched by getting to keep the millions of dollars taken in violation of the Commerce Clause from victims unwilling or unable to navigate the Draconian maze the agencies have erected. It would also be an invitation for tax authorities to erect even more complicated barriers in the future.

Another fair way to consider the class claim issue would be to assume (for the sake of analysis) that every member

of the sub-classes would file and pursue an individual claim if class claims for refund of taxes were retroactively outlawed. With this assumption, it would be highly unreasonable for the tax agencies to suggest that agency benefits were anything but illusory compared to the efficiencies of an organized refund plan.

Our trial court examined substantial evidence and forcefully rejected the agencies' arguments on analogous issues. After determination of liability, during class certification and during consideration of various refund approaches, our trial court made it crystal clear that 1) handling refunds on an ad hoc basis was highly inefficient, and 2) the agencies were trying to make refunds complicated in an attempt to scare the court away from an organized, well-thought-out refund plan; the trial court summarized from the bench:

> As [Deputy Attorney General] Griffin says, he will urge that the very nature of the refund plan in and of itself dictates that the plaintiffs should not be affirmed on appeal.
>
> I would say that I would hope that he has great difficulty with that argument on appeal, because it is similar to the white-collar fraud expert that says that if he can devise a plan that is massive enough, complicated enough, he should be allowed to get away with it and have no restitution, only because of the monstrosity of the correction needed....
>
> [T]he judgment says that what they are doing is not correct, and the fact that it's massive, I don't think in and of itself, should be cause for ignoring it. (RT 113:16 to 114:3.)

The agencies' opposition is based solely on a desire to be unjustly enriched. They will not face the fact that they cannot discriminate against interstate commerce and get to

keep the money when they are caught. Further, our trial court ruled:

> Having to pay back money that is owed due to illegal collections, and that the law says must be paid back, is not a penalty. It is a debt. Having to make refunds may well cause embarrassment to the officials and employees who engineered, implemented and perpetuated the illegal schemes. The refund may attract the attention of other governmental officials and cause them to think twice before ignoring or violating the law.
>
> The example of this and similar cases may give those in the government who seek to follow the spirit and letter of the law an extra weapon to use against those who do not. Had there been a previous class action recovery against one of the State's tax collection agencies, the Department of Motor Vehicles ("DMV") may well have prevailed when the State Board of Equalization ("SBE") pressured it to ignore Section 6276. Similarly, those in the DMV who recognized that the discrimination against interstate commerce was wrong may well have succeeded in correcting the discrimination.
>
> It is costly on the courts, the claimants, and the tax collecting agencies to repeatedly litigate actions in which inter-state commerce has been discriminated against. The law is settled that states and their instrumentalities cannot discriminate against interstate commerce.
>
> It is contrary to public policy to allow government officials to get away with violating the law. It may tend to encourage a lack of respect for the law both by those being governed and by those governing. CT 1554-55.

If this Court would make it clear to the agencies that the principles of *American Pipe v. Utah* (1974) 414 U.S. 538 have tolled the statutes of limitations on filing individual claims for refund (so the agencies will not be unjustly enriched), we suggest that the agencies' position on this issue would reverse and they would strongly support class claims for refund. Remove the greed from their eyes, and the agencies will quickly agree that a class claim for refund is especially efficient here. Moreover, the burden on commerce is clearly excessive.

C. Shielding Tax Agencies From Class Claims For Refund Of Taxes Would Deny The Taxpayers Due Process Of Law.

Any argument, especially now, that explicitly labeled class refund claims were not an acceptable means of satisfying the claims statute when they were filed 15 years ago, would be preaching a violation of the Due Process Clause of the United States Constitution which requires that the state provide a fundamentally fair means for challenging state taxes.

The imposition of a tax is a "deprivation of property." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra*, 110 S.Ct. at 2250. *McKesson* held:

> Prior to finally depriving a citizen of property.... [para.] To satisfy the requirements of the Due Process Clause, ... the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" ... for any erroneous or unlawful tax collection to ensure that *the opportunity to contest the tax is a meaningful one*. [para.] ... [A]llowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back ... would be in contra-

> vention of the Fourteenth Amendment.' (Footnotes and citations omitted, emphasis added.) *McKesson*, 110 S.Ct. at 2251.

In *Mathews v. Eldridge* (1975) 424 U.S. 319 (1975), the court reviewed the requirements of procedural Due Process:

> The fundamental requirement of due process is the opportunity to be heard "*at a meaningful time and in a meaningful manner.*" (Citations omitted, emphasis added.) 424 U.S. at 333.

Several cases have focused on Means of Redress matters in finding a violation of Due Process. *Brinkerhoff-Faris Co, v. Hill* (1930) 281 U.S. 673 (Brandeis, J.), held that Due Process barred the Missouri Supreme Court from retroactively creating a mandatory administrative requirement applicable to the litigant. In finding a violation of Due Process in *Little v. Streater* (1981) 452 U.S. 1, 101 S.Ct. 2202, 2207-08, the court took into consideration a Connecticut evidentiary obstacle to a putative father's testimony in paternity actions. The court took burden of proof into consideration in *Armstrong v. Manzo* (1965) 380 U.S. 545, 551, in finding a violation of Due Process.

Due Process requires a weighing of the policy being served by the administrative barrier and the burden placed on its targets:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (Citation omitted.) *Mathews v. Eldridge*, 424 U.S. at 335.

The facets of the first factor here (the private interests affected by the official action) are the taxpayers' right to engage in and enjoy the fruits of interstate commerce, the right to travel, and property rights in the form of money. While the primary purpose of the Commerce Clause is to protect Commerce, the right to engage in interstate commerce is also an important personal right. *Dennis v. Higgins* (1991) 111 S.Ct. 865, 871-72. The Interstate Commerce right also includes the right to enjoy the fruits of interstate commerce even if the person has not personally engaged in commerce.

For some members of the class, the constitutional right to travel is implicated. See, e.g., *Zobel v. Williams* (1982) 457 U.S. 55, 60, fn. 6. Those class members who moved to California with vehicles purchased at their prior residences paid, and continue to pay, higher vehicle license fees than long-term California residents who bought identical vehicles in California at the same time. The excess taxes are, of course, property.

Even for those members of the sub-classes without Commerce Clause claims, there is a Due Process right to the return of their money illegally taken.

On the first part of the second factor (the risk of erroneous deprivation), a requirement of individual claims would cause a very high risk and probability of an erroneous deprivation of property. It is noteworthy that the merits of the substantive claim are irrelevant to Due Process. *Fuentes v. Shevin* (1972) 407 U.S. 87, 92. If the taxpayers are correct on the liability issues (which should be assumed for this analysis), the taxpayers are entitled to return of the overcharges, but the agencies have made it extremely clear that they are going to use every procedural pretext to unjustly enrich themselves. First, the agencies have demonstrated that, unless the courts forbid them, they will take the position that the time for filing individual

claims for refund has not been tolled by this action, so the only people who can file claims are those who have paid within the approximately three years preceding this Court's final ruling. Second, in preparing their suggested refund plan, the agencies propose that the class members individually supply information which DMV already has in its computers. Without a class claim and class action, few if any taxpayers except Woosley would get their money back. Thus, the risk of erroneous deprivation is extremely high.

The second part of the second factor (probable value of additional or substitute safeguards) is very favorable to class claims because, under our facts, the class claim for refund would be the critical first step of a highly accurate methodology to get the money to its rightful owner. With relatively simple computer programing, DMV's computers can make most of the calculations and print the refund checks. Some class members may need to notify DMV of their current address but they should have done so already because it is required by law. Veh. Code sects. 4159, 14600.

The third factor (the government's legitimate interest in avoiding class refund claims) is slight, and the government interest in favor of well-grounded class claims is great. The interest uppermost in the agencies' mind -- getting to keep their unjust enrichment -- is illegitimate and cannot be considered. The agencies have a valid interest in minimizing administrative costs but they fallaciously compare their costs of administration of a class refund with the cost of doing nothing. The valid comparison is between the cost of handling one class claim and the cost of dealing with millions of individual claims. Put in this proper light, the administrative requirement of individual claims would be counter-productive. CT 1571-82.

Another important government interest which would peg the balance scale in out-weighing any administrative

expense benefit (even if the agencies' administrative expense concern had any substance) is the government's interest in forcing its employees to follow the law. Answering arguments by the agencies that government agencies deserved special dispensation from Code of Civil Procedure section 382, our trial court held:

> [T]here are sound policy reasons to allow class actions against taxing authorities. Ours is a system of government based upon the rule of law. If officials are not required to follow the law, our system of government breaks down. Government officials cannot be above the law, for in order to properly function our system depends on principles of responsibility and accountability.
>
> The class action device recognizes and remedies the temptation to overcharge many people a small amount where there is no effective way for the victims to correct the abuse.
>
> * * *
>
> Further, the victims of Commerce Clause discrimination have little or no say at the polls. Undoubtedly many members of the discrimination class are new residents who have exercised their constitutional right to move to California. They, as well as the remaining members of the class are underrepresented in the political process. Further, the out-of-state sellers of non-resident vehicles whose products are rendered less competitive by the discriminatory tax have no representation whatsoever in the political California process.
>
> There is evidence in this case that could support an argument that the one reason why the defendants in this action persisted with their discriminatory taxing procedures long after defendants' own internal studies

> had demonstrated and acknowledged the gross inequality of those procedure was because the defendant agencies felt immune from responsibility and accountability to out-of-state and underrepresented interests.
>
> The courts have said time and again that states cannot discriminate against out-of-state interests. Despite the Court's ruling, Defendants continue to discriminate against interstate commerce and continue to ignore the presumption of R&TC Section 6276.
>
> * * *
>
> Refunding taxes herein may well serve to discourage other state officials from violating the law. It is not contrary to public policy to impose the burden of refunding illegally collected taxes on the State on the theory that the burden would be borne by the population as a whole and would serve no therapeutic effect.
>
> An illegally collected tax is just as much an obligation of the state as a bond or note. The state cannot repudiate a debt on the excuse that it is owed to its citizens. CT 1550-53.

If a state does not know that it is discriminating against a class, it may be reasonable for the taxpayer to endure higher limits to the taxpayer's Means of Redress, but here DMV and SBE knew that they were discriminating against out-of-state vehicles and that they were ignoring the Legislative intent that vehicle use tax be imposed on a formula basis. (CT 957-8 paras. 160-1.)

Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, the Court held that it was a violation of Due Process for a state to deprive a person of his rights just because a state remedy evaporated when an administrative body did not timely act.

In *Rosewell v. LaSalle National Bank* (1981) 450 U.S. 503, the court emphasized that a proceeding which contains "uncertainty surrounding a state court remedy" or a remedy requiring repetitive suits on the same issue might not satisfy the requirement that a remedy be "efficient." 450 U.S. at 518 and fn. 22.

It is difficult to contemplate a legal approach which would be less fair to the plaintiff sub-classes than that suggested by even contemplating, at this late date, whether California allows class refund claims for taxes (especially if such a ruling now were to be enforced retroactively on these plaintiffs). During the entire fifteen year period since the first class claim was filed, all parties relied upon the clear teachings of *City of San Jose, supra, Javor, supra,* and *Santa Barbara Optical, supra*, encouraging class claims in appropriate situations, including actions for tax refunds, such as here.

Due Process of Law in state tax cases requires that access to the forum that has jurisdiction over applicable federal constitutional issues be as expeditious, inexpensive and direct as practical. To require a taxpayer to jump through meaningless hoops such as requiring the taxpayer to adjudicate its constitutional challenge to a state tax before a state agency that lacks jurisdiction to adjudicate constitutional issues, unlawfully infringes the right of access to a court where a judicial proceeding offers the only means of obtaining relief. See *Bodie v. Connecticut* (1971) 401 U.S. 371, 376; *United States v. Kras* (1973) 409 U.S. 434, 445.

III. A STATE IS NOT PERMITTED, UNDER *FELDER V. CASEY*, TO MANDATE EXHAUSTION OF A STATE ADMINISTRATIVE REQUIREMENT PRIOR TO FILING A FEDERAL CONSTITUTIONAL CLAIM IN STATE COURT.

Felder v. Casey (1988) 487 U.S. 131 holds that persons aggrieved because they have been deprived of federal rights have immediate access to the state courts. *Id.* at 147. Compare to *Brinkerholf, supra. Felder* was decided after our briefs were filed in the Court of Appeal, and we called the decision to the attention of the Court.

The United States Supreme Court has repeatedly held that administrative remedies are deemed exhausted for a constitutional claim over which the administrative agency has no power to adjudicate and as to which the administrative agency cannot grant relief. See *Mathews v. Diaz* (1975) 426 U.S.. 67, 76-77 (1975); *Weinberger v. Soifi* (1974) 422 U.S. 749, 765. In the present case, there is no question that the state administrative agency had no power to rule a California statute unconstitutional. Cal. Constitution, Article IV, Sec. 3.5. Reversal of *Javor* et al. would be contrary to the spirit of *Felder.*

IV. IF THIS COURT DOES NOT ENSURE THAT CALIFORNIA REMEDIES AGAINST ILLEGALLY COLLECTED TAXES REMAIN "PLAIN, SPEEDY AND EFFICIENT," THE CALIFORNIA COURTS MAY LOSE THEIR MONOPOLY ON DECIDING CALIFORNIA TAX CASES.

State tax cases raising federal issues can be tried in federal courts if they are not excluded by the conditional bar of 28 U.S.C. section 1341 which allows state tax litigation in federal court only if the state remedy is not "plain, speedy and efficient."

Many cases have found that state remedies have failed the "plain, speedy and efficient" requirement of the statute. See, e.g., *Town of Ball v. Rapides Parish Police Jury* (5th Cir. 1979) 597 F.2d 43, 45-46; *Dominion National Bank v. Olsen* (6th Cir. 1985) 771 F.2d 108, 112; *Direct Marketing*

Association v. Bennett (9th Cir. 1990) 916 F.2d 1451, 1457; *Retirement Fund Trust of the Plumbing v. Franchise Tax Board* (9th Cir. 1990) 909 F.2d 1266, 1272-74 ("Moreover, to be 'efficient,' a remedy must impose no undue hardship or unnecessary expenditure of time and energy.")

Even cases which have barred a state tax matter from being litigated in a federal district court have been explicit that the words "plain, speedy and efficient" have meaning. The federal courts have been quick to point out why the state remedy under the facts of the case being decided was "plain, speedy and efficient," and the courts stress the need to for states to meet these requirements. In *Rosewell v. LaSalle National Bank* (1981) 450 U.S. 503, the court emphasized that a proceeding which contains "'uncertainty' surrounding a state-court remedy" does not satisfy procedural Due Process. *Id.* at 518. It further observed that a remedy requiring repeated suits on the same issue may not satisfy the "efficient" element of Due Process. *Id.* at 518 and fn. 22. Raising the issue of whether there can be class refund claims for taxes, raises uncertainty and suggests repeated litigation.

California has erected a number of barriers to make it more likely that the tax agencies will not have to refund unconstitutional taxes; this makes refund of unconstitutional taxes uncertain, complex, confusing, slow, and inefficient, especially where there has been mass wrongdoing by the tax authorities as here. The agencies argue that federal constitutional issues have to be presented to them for determination even though they have no power to decide constitutional issues under California Constitution Article III, Section 3.5. (See cases cited immediately before Point IV, page 23, above.) The agencies argue that taxpayers must raise all of their grounds in a claim for refund but that the agencies are entitled to raise new arguments at every

step in the process. As numerous findings of our trial court show, they have done every thing possible to make the process slow and inefficient. The trial court ruled:

> One of the most compelling reasons why maintenance of this action as a class action provides the fairest and most efficient method of protecting the rights of the parties is the fact that the Court will supervise and oversee the refund process.
>
> Several factors demonstrate the value of continued supervision by the Court.... Rather than trying to make a refund procedure more efficient, Defendants' strategy to date appears to be to avoid refunds by creating a Draconian obstacle course which taxpayers must navigate to obtain the refunds to which they are entitled.
>
> * * *
>
> When asked the cost to manually review records for nonresident vehicles, the DMV responded with the cost to make separate trips to the files for each of the approximately 275,000 reg[istration] packets per year.
>
> * * *
>
> Given the number of documents that comprise the bulk of the evidence in this action, and given the complexity and importance of the issues, particularly the constitutional issues, it is likely that the supervision of a refund plan by this Court will be less of a burden time wise on the judicial system than even a single re-litigation of the issues in another individual case.
>
> If there is to be a fair and efficient procedure to refund the overcollections, the Court concludes that

the superior method is under this Court's supervision of this class action. CT 1602-1604.

28 U.S.C. section 1341 requires that access to the state forum that has jurisdiction over the relevant federal constitutional issues be as expeditious, inexpensive and direct as practical. In the demonstrated presence of intentional discrimination against interstate commerce, it would be highly uncertain, slow and inefficient to require a class of taxpayers with identical facts (which are clearly shown in DMV's records) to individually file claims for refund with three agencies which have no authority to rule on constitutional issues.

VI. EVEN IF THIS COURT WERE TO OVERRULE CLASS ACTION PRECEDENT UPON WHICH THE PLAINTIFF SUBCLASSES HAVE RELIED, THE OVERRULING DECISION SHOULD BE APPLIED ONLY PROSPECTIVELY IN ORDER TO AVOID MANIFEST INEQUITY AND INJUSTICE.

When this class action was filed in 1977, there were (and still are) in full force and effect, decisions of this Court culminating in *Javor, supra* and *San Jose, supra*, and followed by the Court of Appeal in *Santa Barbara, supra*, which clearly authorized this class action for tax refund pursuant to the procedure established in section 382 of the California Code of Civil Procedure. The plaintiff subclasses were entitled to rely on section 382 and *Javor* et al. and had no reason whatsoever to foresee reversal. The agencies have never, at any stage of this litigation, even in this Court, challenged the fundamental availability of a class claims for refund of taxes. (Compare, *Chevron Oil Co. v. Huson* (1971) 404 U.S. 97, 99; *Parrott v. Furesz* (1957) 153 Cal.App.2d 26.) The trial court certified the classes over the agencies' objection on other grounds, and

the Court of Appeal upheld this certification against the agencies' attack on other grounds.

Prospective-only overruling is compelling and common "to give relief to counsel and litigants caught in procedural traps." *Parrott, supra.* Courts have been sympathetic to a litigant's plight when the subsequent decision completely bars the litigant`s claims, as, for example, where a subsequent change in a procedural rule would work to bar a cause of action filed in reliance on the former rule. *Newman v. Emerson Radio Corp.* (1989) 48 Cal. 3d 973, 990, where this Court also held:

> [O]f major relevance to our inquiry are the purposes behind the new rule, and, even more important, the reliance of parties on the preexisting state of the law.... [A] major component of analyses looking to possible exceptions to the usual rule on the extent of reliance by litigants on the former rule." Id. at 989-90.

Accord, *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 605 (statute of limitations); *Northern Pipeline Co. v. Marathon Pipe Line Co.* (1982) 458 U.S. 50 (powers of bankruptcy trial judge unconstitutionally delegated but the overruling decision not applied retroactively to void his judicial acts in the case); *Chevron, supra* (statute of limitations); *England v. Medical Examiners* (1964) 375 U.S. 411 (litigation of federal claims in state court in reliance on former rule permitting return to federal court, overruling decision not applied retroactively to bar return to federal court); *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 360 P.2d 897 (cases on prospective-only overruling involving procedural traps collected at 900) (increase in required specificity of pleading not retroactive); *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450 (party reliance on erroneous interpretation by inferior court of statute governing motion for new trial); *Faus, infra*

(procedural trap cases collected at 312 P. 2d 684) (rule of evidence). See also, *Abbitt v. Franklin* (1984) 731 F.2d 661, 663 (10th Cir.), quoting with approval from *Occhino v. United States* (8th Cir. 1982) 686 F.2d 1302, 1308 at fn. 7. Accord, *In Re Metropolitan Hospital* (E.D.Pa 1991) 131 B.R. 275, 281, which held: "Ordinarily, a procedural change in the law ... is not given retroactive application." This case is cited because of the recency and thoroughness with which it reviewed the federal authorities on procedural-only overruling.

The barring of any and all meaningful remedies of the plaintiff sub-classes in the case at bar would constitute the very type of procedural trap that procedural-only overruling is designed to avoid. *Newman, supra*, also held at 989:

> "The most compelling example of such reliance occurs when a party has acquired a vested right or entered into a contract based on the former rule, and we are more reluctant to apply our decisions retroactively in those cases...."

Accord, *Sutter Basin Corp. v. Brown* (1953) 40 Cal.2d 235, 253 P.2d 649, 656 (this Court granted a writ of mandate to avoid retroactive application of a rule which would have impaired a contract made in reliance upon the earlier rule); *Moradi-Shalal v. Fireman's Fund Ins.* (1988) 46 Cal.3d 287 (new rule entirely precluding previously recognized private action under the Insurance Code applied prospectively only); *City of Berkeley v. Superior Court of Alameda* (1980) 26 Cal.3d 515, 532; *Mitchell v. National Automobile & Casualty Ins. Co.* (1974) 38 Cal.App.3d 599, 604.

When the instant class action was filed (indeed, when the instant plaintiffs' taxes were illegally and unconstitutionally collected by State here), the corresponding cause of action vested in each plaintiff, and this cause of action is a

vested right which should not be barred or divested by retroactive application of *Javor* et al. *Jones v. City of Los Angeles* (1963) 215 Cal.App.2d 155, 30 Cal.Rptr. 124. Especially is this so when the vested right is predicated on a constitutional or statutory provision. *County of Los Angeles v. Faus* (1957) 312 P.2d 680, at 686, where this Court held:

> A well-recognized exception to this general rule is that, where a constitutional provision or statute has received a given construction by a court of last resort and contracts have been made or property rights acquired under and in accordance with its decision, such contracts will not be invalidated will vested rights acquired under the decision be impaired by a change of construction adopted in a subsequent decision. Under those circumstances it has been the rule to give prospective, and not retrospective, effect to the later decision.

Therefore, the cause of action of the plaintiff classes is a vested right entitling them to prospectivity only application if any supposed reversal of *Javor* et al., retroactive application of any overruling of *Javor* et al. would have the effect of requiring the plaintiff sub-classes to have foreseen such overruling when they filed this class action fifteen years ago in 1977. Compare *U.S. Cold Storage v. Great West. Sav. & Loan* (1985) 165 Cal.App.3d 1214, 1226 (six years), where it was held, on all fours with the case at bar in this regard:

> We now consider whether retroactive application would produce inequitable results. [para.] We answer in the affirmative. We conclude that it would be highly inequitable to require junior lienors to have foresee the Arnolds rule, given that it is a definite departure from prior law, the advent of which was not clearly indicated. In the present case, plaintiff would

> have had to foreseen the Arnolds rule six years before it came into existence. [para.] Additionally, we believe that junior lienors are entitled to notice of this new requirement which drastically affects their rights. [para.] Finally, we conclude that retroactive application of the Arnolds rule would be unjust because it has the potential of causing injury to many junior lienors who may have had the ability to tender, but did not do so under the belief that no such requirement existed.

As held by the United States Supreme Court: "[W]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity." *American Trucking Associations, Inc. v. Smith* (1990) 110 S.Ct. 2323, 2331, quoting with approval from *Chevron* which quoting with approval from *Cipriano v. City of Houma* (1969) 395 U.S. 701, 706.

Retroactive application would deprive the plaintiff subclasses of any meaningful remedy because new lawsuits upon the same claims which were filed in reliance upon section 382 of the Code of Civil Procedure and *Javor* et al. may now be time barred (under the agencies' position). Even if not time barred, these claims would spawn much litigation which could and should be avoided. Either way, retroactivity here would be shockingly inequitable, indeed, a mockery of justice. To protect the reasonable and justified expectations of the plaintiff classes and avoid such injustice, we respectfully submit that, in the supposed event of reversal of *Javor* et al., application of the overruling law should be prospective-only. This would avoid the constitutional hazards involved in otherwise according the plaintiff classes due process of law in dealing with their claims for refund of the illegally collected taxes. A final justification for prospective-only application is application of the doc-

trine of *stare decisis* for the reason that State did not raise any issue with respect to the availability of a class action to seek a tax refund. *Chicot County Dist. v. Bank* (1940) 308 U.S. 371, 375.

CONCLUSION

The primary reason that class claims may be used for refunds of taxes is a long line of cases upon which the parties have relied; however, class claims for refund of taxes also have an important role in protecting the right to interstate commerce and preserving Due Process of Law. Prior decisions on class claims for refund are correct and should be followed.

Respectfully submitted,

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By /s/ Patrick G. Woosley

Attorneys of Respondent
in his individual capacity

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7/24

Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

No. 92-1605

In The

Supreme Court of the United States

October Term, 1992

PATRICK G. WOOSLEY,

Petitioner,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF OF RESPONDENTS STATE OF CALIFORNIA, et al., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the California Supreme Court's holding, that the California Constitution and statutes did not permit any class claim for refund to provide the basis for the class action portion of this suit for tax refund, an independent and adequate state ground which raises no valid Due Process Clause or Commerce Clause issue?

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No. 92-1605

In The

Supreme Court of the United States

October Term, 1992

PATRICK G. WOOSLEY,

Petitioner,

v.

STATE OF CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF OF RESPONDENTS STATE OF CALIFORNIA, et al., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioner Woosley invokes jurisdiction under 28 U.S.C. § 1257(a). In addition to the fact that there is no final judgment from the California courts in this litigation (see below at pages 6-7, note 3), state respondents argue that there is no jurisdiction because the California holding challenged by the petition is an independent and adequate state ground.

SUPPLEMENTAL STATEMENT OF THE CASE

The California Supreme Court has decided the underlying Commerce Clause issue in favor of petitioner Woosley. Undeterred by this fact, petitioner tries to convince this Court that the California Supreme Court is an active conspirator in a California "scheme to discourage the exercise of federal constitutional rights and to illegally fill its coffers." Pet. 6. Such a serious accusation should be backed by strong support, not just emotional language. Instead, petitioner Woosley repeatedly makes assertions which have no valid basis in the record. To clear the air, respondents will counter some of those statements before turning to the argument in this opposing brief.

Although respondents are not petitioning this Court for relief from the California Supreme Court's holding that certain vehicle license fee statutes violated the Commerce Clause, the current petition's intemperate and abusive language regarding this issue requires some response. Petitioner Woosley excoriates the employees of the California Department of Motor Vehicles as if they were criminal conspirators whose only goal was the knowing and willful deprivation of taxpayers' constitutional rights. See, *e.g.*, Pet. at 8-9, 17, 24. To the contrary, the California Supreme Court has determined that the Department of Motor Vehicles fully complied with the California vehicle license fee statutes, which the court then found to be unconstitutional. App. A, 21a. Under California Constitution article III, section 3.5 (App. G,

269a),[1] employees of that department were barred from determining that those statutes were unconstitutional.

Petitioner Woosley claims that the state's opposition to petitioner's Commerce Clause arguments was "frivolous." Pet. 17. However, the supposed clarity of Commerce Clause discrimination appears to vary from moment to moment, depending upon which perspective petitioner wishes to assume: on the one hand, petitioner argues as if the problems with the Commerce Clause were so clear that they should have been seen by any state employee, down to a newly-hired clerk; on the other hand, from the taxpayers' side, petitioner argues that the Commerce Clause problems were only discernable by a champion such as petitioner Woosley, who was "an attorney, a certified tax specialist and an automobile collector." Pet. 8.

This opposition brief is not the place to reargue the state's Commerce Clause position, which was rejected in the California Supreme Court. However, since petitioner's argument heavily relies on the assumption that the state's Commerce Clause arguments were part of a bad faith scheme to violate constitutional rights, the good faith nature of the state's arguments should be briefly noted. It can be seen from the California Supreme Court's description of the statutory structure that the vehicle license fee statutes were an attempt to provide a workable system with substantially equivalent treatment for

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[1] Citations herein to "App." are to the designated appendix of the petition ("Pet.").

all vehicles. (App. A, 7a-12a, 19a-22a.)[2] Also, this suit involved only taxpayers who were residents of California, who were being taxed for the privilege of using vehicles on the California highways. Accordingly, one of the state's Commerce Clause arguments was based on one of the holdings of this Court in *Goldberg v. Sweet*, 488 U.S. 252 (1989), that the discrimination factor of dormant Interstate Commerce Clause analysis was not violated when the state's tax fell on that state's own resident, "the insider who presumably is able to complain about and change the tax through [that state's] political process"; in the words of this Court, "It is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Id.* at 266. Although the California Supreme Court rejected this argument, it provides an example of the good faith nature of the arguments which the state made in support of its Commerce Clause position.

Brushing aside the fact that the California Supreme Court held in his favor on the Commerce Clause issue, petitioner claims he was unfairly surprised by that Court's additional holding that, under California law applicable to the times and taxes involved in this case, a class claim may not be used to seek a refund of taxes. Before reaching this holding, the California Supreme Court specifically directed that the parties "file

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[2] As the California Supreme Court noted, the differences in petitioner Woosley's case were "particularly large" (App. A, 4a); this was because he had initiated this test case with the purchase of an old but extremely valuable collector's car, which had appreciated (rather than depreciated) in value.

supplemental briefs on the issue of whether a class claim may be used to seek a refund of taxes." Order of June 25, 1992, quoted Pet. 4. The state's briefing, to which petitioner replied in August 1992, specifically raised the applicability of California Constitution article XIII, section 32 (App. G, 270a), pointed out that the California Supreme Court had never decided the issue being briefed, and argued that earlier California Court of Appeal decisions involving class tax refund claims should be disapproved. Certainly petitioner was disappointed with the court's eventual holding, which relied upon article XIII, section 32 (App. A, 43a, 44a, 48a), confirmed that the class claim for refund issue had never been decided by that court (App. A, 41a-43a), and disapproved the lower appellate court decisions (App. A, 48a). But after petitioner's full opportunity to brief the issue, petitioner was not unfairly surprised.

Petitioner Woosley also repeatedly implies that the State of California argued that the merits of the underlying Commerce Clause issue should be decided for the state because the state could not afford an adverse ruling. The State of California did discuss the amounts potentially at issue in this case when arguing such subjects as determining whether discretionary review was appropriate, deciding whether a class action was properly certified, and recognizing the role and importance of procedural safeguards. But the state never argued to the California Supreme Court, and that court never indicated, that the merits of the Commerce Clause issue could be affected by the total fiscal exposure of the state.

ARGUMENT

THE CALIFORNIA SUPREME COURT'S HOLDING, THAT THE CALIFORNIA CONSTITUTION AND STATUTES DID NOT PERMIT ANY CLASS CLAIM FOR TAX REFUND TO PROVIDE THE BASIS FOR THE CLASS ACTION PORTION OF THIS TAX REFUND SUIT, IS AN INDEPENDENT AND CONSTITUTIONALLY ADEQUATE STATE GROUND; PETITIONER RAISES NO JURISDICTIONAL BASIS FOR SUPREME COURT REVIEW.

A. The California holding at issue rests entirely upon an interpretation of California law.

Petitioner seeks review of a California Supreme Court holding which is based solely on California law. That holding is an independent and adequate state ground.

The California Supreme Court did decide a clearly federal question involving the Commerce Clause, but that question was decided in favor of petitioner Woosley. Also in favor of petitioner Woosley was the California Supreme Court's holding that California law permits tax refund actions to be conducted as class actions when all members of the class have filed timely individual claims for refund.[3]

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[3] The case has been remanded for the trial court to determine, inter alia, whether there are enough such taxpayers to merit proceeding with a class action. App. A, 53a. Thus there is no final California judgment in this case. 28 U.S.C. § 1257 limits the jurisdiction of this Court in state-originated cases to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . . " "In general, the final-judgment rule has been interpreted 'to preclude review-

Taxpayer Woosley's petition targets the California Supreme Court's holding that California law does not permit this tax refund class action to be based upon a class claim for refund: under this holding, which is purely a matter of California law, each member of any eventual litigating class must have timely filed his or her own individual claim for tax refund.

The California Supreme Court gave the following basis for its holding that petitioner Woosley's purported class claim for tax refund could not serve as a basis for the class action component of this suit:

> "The California Constitution expressly provides that actions for tax refunds must be brought in the manner prescribed by the Legislature. Article XIII, section 32, of the California Constitution provides in this regard: 'After payment of a

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ability . . . where anything further remains to be determined by a state court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.' *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). More class action issues remain to be determined below, determinations which may give rise to further appeals. If petitioner Woosley can find a federal question in the current California class action holding, might he not be similarly offended in the remaining part of the case? If there were a true federal issue presented by the petition, it would be appropriate to devote this Court's time to establishing that none of the exceptions in the "final judgment" jurisdictional rule would apply here (see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478-485 (1975)). However, lack of jurisdiction already is clear in this case from the absence of any valid federal question in the petition, that is, from the fact that the California Supreme Court's class action holding was based upon an independent and constitutionally adequate state ground.

> tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, *in such manner as may be provided by the Legislature.'* (Italics added [by the court].) This constitutional limitation rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues. [Citation.]" App. A, 43a.

After a complete review of the statutes which the California Legislature had provided to govern the tax refund procedure (see App. A, 43a-48a), the California Supreme Court held that the Legislature had not authorized petitioner Woosley's class claims for refund, and that "the California Constitution precludes this court from expanding the methods for seeking tax refunds expressly provided by the Legislature." App. A, 48a.[4]

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[4] Before this case, the California Supreme Court "never has considered" the issue "whether a class claim may be filed seeking refunds of vehicle-license fees and use taxes." App. A, 41a. Having reached its holding on this matter of first impression for it, the California Supreme Court then disapproved four lower appellate court decisions to the extent they expressed views to the contrary. App. A, 48a. Petitioner offers no valid support for his inflammatory claims that the California Supreme Court itself has "concocted a new procedural requirement to avoid refunds," thus capping a purported "scheme" by California "to discourage the exercise of federal constitutional rights and to illegally fill its coffers." Pet. 6. State respondents suggest that the California Supreme Court's review of the pertinent provisions of the California Constitution and statutes (see App. A, 42a-48a) provides a quite reasonable and well-balanced interpretation of California law as the basis for its holding.

There is no federal element to this holding. Thus it is an independent state ground which must be adequate to support the holding unless the California jurisdictional rule effectively thwarts the exercise of a federal constitutional right through use of an " ' "arid ritual of meaningless form," . . . and would further no perceivable state interest.' " See *Osborne v. Ohio*, 495 U.S. 103, 124 (1990).

B. Under this Court's *McKesson* decision, the federal Constitution permits the state procedural requirement which forms the basis of the California holding.

In *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990), this Court held that the Constitution permits the states "to engage in sound fiscal planning" by imposing "various procedural requirements on actions for postdeprivation relief" in tax matters. *Id.* at 44-45. *McKesson* then provides examples of permissible procedural requirements, noting, among others, that the state might "provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; [and] enforce relatively short statutes of limitations applicable to such actions. . . . " *Id.* at 45 (footnote omitted). Such procedural protections suffice "to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax." *Id.*

The present petition challenges a California requirement that, in order to be a member of the class in this class tax refund lawsuit, each class member must have

paid his or her tax and filed a timely individual claim for refund. This procedural requirement does not thwart the exercise of any constitutional right: petitioner Woosley himself is an example of a taxpayer who satisfied the requirement and who has prevailed in the California Courts on the Commerce Clause issue. This California requirement clearly fits within this Court's example in *McKesson* of a requirement for "paying under protest or providing some other timely notice of complaint." *Id.*[5]

Petitioner, attempting to avoid this precise application of *McKesson*, bases his *McKesson* argument not upon the *type* of procedural requirement imposed by California but upon the alleged *time* of its imposition. Petitioner bases this purported distinction of *McKesson* solely upon the *McKesson* opinion's framing of its examples as stating what "the State" might do "in the future." *Id.*; see Pet. 7. This Court's use of the future tense simply is a reflection of the facts of the *McKesson* case. As this Court specifically noted, "in the present case" Florida had "fail[ed] to avail itself of certain of these methods of self-protection. . . . " *Id.* This is the reason the Court was explaining to Florida what it might do "in the future" to protect its fiscal planning interests.

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[5] Federal taxpayers also must file individual claims for refund before joining together in class actions for refund of federal taxes. See *Heisler v. United States*, 463 F.2d 375 (9th Cir. 1972), cert. denied, 410 U.S. 927 (1973); *Saunooke v. United States*, 8 Cl.Ct. 327 (Cl.Ct. 1985); *Sutherland v. Egger*, 605 F.Supp. 28, 30 (W.D. Pa. 1984). Thus the California requirement cannot rationally be classified as a " 'novel procedural doctrine[ ].' " See Pet. 9.

In any event, the California Supreme Court's challenged holding in the present case is not the retroactive application of a newly concocted jurisdictional requirement. It is simply the California Supreme Court's interpretation of what the California Constitution and statutes required when petitioner was paying his taxes, filing his administrative claims for tax refund, and bringing his tax refund action in court. Article XIII, section 32 of the California Constitution was enacted in 1974, years before petitioner's tax liability arose. To determine what the Legislature had provided as to tax refund claims and tax refund suits, the California Supreme Court looked to the statutes as they existed at the times the various functions were performed in this case (see App. A, 43a-48a); for example, at one point that court specifically referred to "the entire statutory scheme that governed requests for refunds of sales and use taxes when Woosley's claim was filed in 1977." App. A, 45a. The current petition for certiorari totally fails to drag the California holding out from the clear protective coverage of this Court's decision in *McKesson*.[6]

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[6] Although it was unclear from the *McKesson* record whether Florida law required tax payments to be made under protest in order to perfect the right to sue for refund (*Id.* at 24 n. 4), the *McKesson* decision made clear that "upon remand the State may invoke, as an independent basis for refusing to provide a refund [which was being sought on Commerce Clause grounds], petitioner's failure to comply with a notice requirement that was in effect at the time of petitioner's tax payments." *Id.* at 25 n. 4. This holding clearly contemplated the ability of the Florida courts to consider, years after the tax payment, whether Florida statutes provided, at the time of such payment, for payments to be made under protest.

California's requirement, that tax refund claims be filed on an individual (nonclass) basis, allows the state to evaluate the fiscal situation and explore possible changes in state law based upon a review of the individual facts of each claimant. It is precisely the type of procedural rule which is validated in *McKesson* as being supported by a proper state interest. Thus this rule is both an independent and an adequate state ground.

C. The federal Constitution does not require that California's holding be applied solely prospectively.

The California Supreme Court considered petitioner's argument that the Court's interpretation of the California Constitution and statutes should be applied prospectively only. That argument was rejected on the basis that, under established California practice, a statutory interpretation is not limited to prospective application when it merely (1) disapproves prior lower appellate courts' misconstruction of California law and (2) correctly applies California law as it had existed "at the time here in question." App. A, 50a-51a. Again, this is an application of California law which is well within the jurisdiction of the California Supreme Court. Petitioner argues that the case "cries out for prospective-only application" (Pet. 15), but petitioner is unable to present any authority indicating that solely prospective application of the California Supreme Court's holding regarding this California procedural rule was required by the United States Constitution. "When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking*

Assns., Inc. v. Smith, 496 U.S. 167, 177 (1990) (Opinion of O'Connor, J.).[7]

D. Neither the Commerce Clause basis of the claim for refund nor California Constitution article III, section 3.5 affects the validity of the California requirement of individual (nonclass) claims for tax refund.

Petitioner Woosley attempts to frame a separate Commerce Clause argument on the basis of his inflammatory accusations that the California Supreme Court is a part of a conspiracy to deprive taxpayers of their Commerce Clause rights. Pet. 6, 23-25. The California Supreme Court, which after all held in favor of petitioner on the underlying Commerce Clause question, recognized that the procedural limitation flowing from California Constitution article XIII, section 32 "rests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected

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[7] *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930) (cited Pet. 14-15), is not on point. In that case the effect of the state court's decision was that (1) under prior holdings no administrative remedy had been available before the decision, and (2) it was too late to apply for it after the decision, thus resulting in a denial of due process. In the present case all taxpayers had the administrative remedy available to them through individual claims for refund. This Court in *Brinkerhoff-Faris* specifically noted that "the mere fact that a state court . . . has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court." *Id.* at 680 (footnote omitted).

tax revenues. [Citation.]" App. A, 43a. As noted above, the *McKesson* case involved a violation of the Commerce Clause, yet this Court made clear in *McKesson* that the involvement of constitutional claims does not prevent the states from protecting their fiscal planning through use of reasonable procedural safeguards which can provide "an independent basis for refusing to provide a refund." 496 U.S. at 25 n. 4. Similarly, in *Swaggart Ministries v. Cal. Bd. of Equalization*, 493 U.S. 378, 397-99 (1990), this Court confirmed, as a proper "application of state procedural law" (*id.* at 398), the validity of California's requirement that any constitutional ground must be specifically raised in the taxpayer's administrative claim for tax refund before the California courts will have jurisdiction to consider it. Thus, application of a procedural rule which is valid under *McKesson* will not violate the Commerce Clause even when such application bars all consideration of a Commerce Clause issue. Petitioner Woosley, who in tnis case received a *favorable* Commerce Clause holding from the California Supreme Court, has no Commerce Clause complaint.

Article III, section 3.5 of the California Constitution bars administrative agencies from declaring statutes unconstitutional. Under the *McKesson* rule, that fact does not mean the state cannot require any prelitigation notice of constitutional issues. A claim for refund must still specify constitutional grounds along with other grounds if it is to provide the fiscal planning function validated in *McKesson*. The California Supreme Court has determined that California law requires each taxpayer who wishes to make a constitutional challenge to file an individual tax refund claim setting forth the details of his or her claim.

This procedural requirement clearly serves the purpose, the validity of which was confirmed in *McKesson*, of enabling the state "to engage in sound fiscal planning." 496 U.S. at 44.[8]

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[8] The California courts have specifically recognized that, even with article III, section 3.5's limitations on the administrative agencies, the California requirement that a tax refund claim designate all constitutional grounds "allows the state to evaluate the merits of the taxpayer's claim and to plan fiscal policy accordingly." *Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd.*, 235 Cal.App.3d 478, 489 (1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2995 (1992). In addition, the requirement that such claims be designated permits the administrative agency to determine whether the statutes are susceptible of a construction that may avoid the constitutional problem. In the present case it was taxpayer Woosley's position throughout the entire California administrative process and court litigation that the statutes could be construed as being valid, and that it was the administrative constructions of those statutes which produced unconstitutional results. Under those circumstances it was clearly reasonable for California law to require that the administrative agencies have the chance to reconsider their own interpretation of the California statutes under the facts applying to each taxpayer. (It was the California Supreme Court which first held that the Department of Motor Vehicles had accurately construed the vehicle license fee statutes, but that the statutes themselves violated the Commerce Clause. See App. A, 19a-32a.)

E. The United States Constitution does not require the states to permit any class actions for tax refund; California's reasonable restriction on when such class actions will be allowed is a purely state procedural requirement which constitutes an independent and adequate state ground that is not reviewable in this Court.

Finally, it is significant that petitioner Woosley can muster no argument that the federal Constitution requires the states to provide for the litigation of tax refund actions as class actions. There is no such requirement. In an analogous area involving the federal Tax Injunction Act (28 U.S.C. § 1341), this Court has held, in cases involving constitutional issues, that the normal refund procedures provided to individual taxpayers by the California Legislature are plain, speedy and efficient. *Franchise Tax Board of Cal. v. Alcan Aluminium*, 493 U.S. 331, 338 (1990), citing *California v. Grace Brethren Church*, 457 U.S. 393, 417 (1982). Class action procedures are not necessary to make the taxpayers' court remedies plain, speedy and efficient. *Mandel v. Hutchinson* 494 F.2d 364 (9th Cir. 1974); accord, *Waldron v. Collins*, 788 F.2d 736, 738 (11th Cir. 1986), cert. denied 479 U.S. 884.[9] Now the California Supreme Court has held that California law permits tax refund actions (including, possibly, this

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[9] In fact, the class action aspects of petitioner Woosley's tax refund suit have complicated the matter so as to consume much of the time it has taken to reach this point. It is estimated that the constitutionality of the challenged statutes could have been determined more than a decade ago if petitioner Woosley had just brought this action as a test case filed as an individual taxpayer.

action) to be litigated as class actions. That court also has held that the class action portion of this action cannot be based upon petitioner Woosley's attempted administrative class claim for tax refund, for the California Constitution and statutes did not permit such class claims for refund at the time in question. This is matter of California procedural law which is not a proper subject for United States Supreme Court review.

CONCLUSION

For the reasons given above, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: April 30, 1993.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 4 - 1993
OFFICE OF THE CLERK

No. 92-1605

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

PATRICK G. WOOSLEY,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

AMICUS CURIAE'S INTEREST IN ACTION

Having requested and received the written consent of all parties to file this brief, the Association of California Car Club respectfully submits this brief as amicus curiae in support of the petition for writ of certiorari, pursuant to Rule 36 of this Court. Consents have been filed with the Clerk of the Court.

Amicus curiae is the Association of California Car Clubs (ACCC) which was also amicus curiae for petitioner in the review had before the California Supreme Court ("California Court") in this matter.

The ACCC represents over 11,000 automobile enthusiasts throughout the State, many of whom are members of the subclasses as decreed by the trial court herein. ACCC originally abstained from involving itself in this litigation, having no reason to believe that the interests of its members were not being adequately being protected by California law allowing class claims and actions for tax refunds, and having reasonably relied on that well-established case law allowing class claims for refund. However, the California Supreme Court's action in this matter has totally undermined ACCC's reasonable reliance. ACCC's participation in this matter is necessitated due to the severe effect that the Supreme Court ruling has had upon members of ACCC. Particularly, ACCC members are the ones that are being summarily deprived of property without due process of law, and further suffered the violation of their constitutional right to engage in interstate commerce.

ACCC members were particularly shortchanged by the action of the California Supreme Court inasmuch as there were numerous cases at the appellate level which the California Court overturned *sua sponte,* which specifically held that class-action suits for tax refund were proper in California. Now, after the statute of limitations has run on numerous claims, the California Court has decreed retroactively that class claims were not maintainable, on the untenable grounds that the California *Vehicle Code* did not allow for such a class claim. Amicus will argue below that the California Court's construction of, and focus on, the California *Vehicle Code,* was entirely improper and pretextual because the Court totally ignored 1) that California taxpayers' civil rights were tortious being violated, and accordingly as a matter of California law a class action was maintainable, and 2) that if in fact California law did not provide such class relief, it would be violative of due process of law as imposing an impossible burden upon class members in order to assert their rights and gain access to the court to vindicate their rights.

II

ARGUMENTS

A. THE CALIFORNIA SUPREME COURT'S DECISION IS UNTENABLE BECAUSE IT TOTALLY IGNORED THE FACT THAT THE UNCONSTITUTIONAL TAX CONSTITUTED A TORT TOWARDS THE MEMBERS OF THE CLASS, AND THAT WOOSLEY, ON BEHALF OF THE CLASS, FILED THE APPROPRIATE CLASS CLAIM PURSUANT TO PRESCRIBED CALIFORNIA LAW

Both the trial court, the Court of Appeals and the California Supreme Court found that there was class discrimination by virtue of violation of the interstate commerce clause. (Appendix to petition 32a, 68a, 140a-143a).

Indeed, the trial court specifically found and certified that there was a "discrimination class." (Appendix to petition 220a). Manifestly, under California law, action by the State or its agency which is unconstitutional in nature constitutes a tort, for which the state provides a remedy. *Fenton v. Groveland Community Service District* 135 Cal.App.3d 797, 803 (1982). Thus, under California law, the unconstitutional taxation committed by the Sate constituted a tort against Woosley and all member of the class.

California *Government Code* § 905.2, provides in relevant part:

> "There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the State: . . . (c) For money or damages (1) on express contract, or (2) for an injury for which the State is liable."

According, petitioner Woosley, on his own behalf and those similar situated, submitted a claim that conformed to the requirements of the applicable *Government Code* § 910 (Appendix D to petition, pages 122a-123a). Under that section, a class claim can be maintained for tortious conduct of the State or its agents. *City of San Jose v. Superior Court* 12 Cal.3d 447 (1974). Thus,

Woosley's claim was proper as to protect the interests of all class members so as to assure them a remedy for the State's tortious acts of unconstitutional taxation.

Notwithstanding Woosley's clear compliance with the requirements of California *Government Code* § 910, and notwithstanding the Court's conclusion that the State had violated the commerce clause, the California Court completely ignored the tort aspect of this case and Woosley's compliance with the State's tort claims statute, thereby circumventing the whole issue completely and chose instead to dwell upon an issue that it *thought* would save the State's fisc, i.e. a novel and narrow reading of *Vehicle Code* § 42231, which as set forth below, also constitutes and untenable State ground for denying relief to class members of the State's discriminatory conduct.

Thus, in sum, Woosley properly submitted a class claim for the tortious acts of the State, and the California Court's refusal to acknowledge Woosley's complete adherence to the applicable State claims procedure, demonstrates that the Court's decision was totally pretextual so as to allow the State to escape liability for its unconstitutional acts.

B. THE STRUCTURE AND EVOLUTION OF THE STATUTES AND THEIR LEGISLATIVE HISTORY SHOW THAT THE CALIFORNIA SUPREME COURT'S RELIANCE ON VEHICLE CODE § 42231 IS AN UNTENABLE STATE GROUND FOR DENYING RELIEF TO THE VICTIMS OF DISCRIMINATION AGAINST INTERSTATE COMMERCE

The petition for Certiorari did not fully explore one of the fatally defective links in the California Supreme Court's rationale for using the *Vehicle Code* to deny relief to admitted victims of discrimination against interstate commerce. For the California Supreme Court's state ground for overturning a long and unbroken line of cases validating class claims in order to avoid eliminating the vehicle license fee's discrimination against interstate commerce to be a tenable ground, all of the Court's premises must be true; however, each of them is false. The premises are: (1) The voters of the state intended to engraft the principle of

strictissimi juris into the California Constitution when they approved the redrafting of Article XIII in 1974 to make it more readable, (2) *Vehicle Code* § 42231 applies to the refund of vehicle license fees, and (3) § 42231's reference to an agent indicated that the legislature did not intend to allow class claims for refund. The Petition concentrated on showing failure of the first and third requirements; however, this brief demonstrates that California Court's logic also fails the second prong of the analysis. Failure of any prong makes the California Court's denial of relief untenable, and the following analysis completely undermines the second prong of the California Court's *sua sponte* analysis.

ACCC wishes to share with this Court some information which completely undermines the second and third prongs of the California Court's *sua sponte* analysis.

It is fundamental to the analysis of the California vehicle registration and licensing systems to recognize that registration fees and license fees are two completely different fees imposed by completely different codes of the California statutes. *California v. Buzard* 382 U.S. 386, 390 fn. 5, 393-394, 396, 15 L.Ed.2d 436, 86 S.Ct. 478 (1966); *Buzard v. Justice Court*, 198 Cal.App.2d 814, 816-187 (1962). The vehicle registration fee, and a number of related fees are imposed by the *Vehicle Code*. In contrast, the vehicle license fee is in lieu of a personal property tax (*Revenue and Taxation Code* § 10758), is imposed by the *Revenue and Taxation Code*, and has its own collection and refund provisions (§§ 10851 to 10901). Each of these is discussed in detail below.

1. THE STRUCTURE OF THE VEHICLE LICENSE FEE STATUTES SHOWS THAT THE LEGISLATURE DID NOT INTEND FOR VEHICLE CODE § 42231 TO RESTRICT THE REFUND RIGHTS OF PAYERS OF VEHICLE LICENSE FEES

The *Revenue and Taxation Code*'s refund provision specifically refers to the "license fee" imposed by "this part" of the *Revenue and Taxation Code* (§ 10901). § 10901 is in Part 5, entitled "Vehicle License Fees". Further, § 10901 is in Chapter 3 thereof, entitled "Collection and Refunds". § 10901 does not preclude class claims for refunds. The State does not apply the *Vehicle*

Code collection sections to vehicle license fees. *California v. Buzard, supra*; *Buzard v. Justice Court, supra*. § 10901 contains the essential elements of a refund section and makes no reference to the *Vehicle Code*, so there is no reason in law or fact to look to the *Vehicle Code* for barriers to the return of unconstitutional vehicle license fees.

The legislature has several times recognized that refunds of registration fees are governed by different statutes than those governing refunds of vehicle license fees, although the Legislature has generally kept the statute of limitations the same. For instance, 1961 California Statutes Chapter 20 amended *Revenue and Taxation Code* § 10901 and *Vehicle Code* §§ 42231, 42232 and 42234 as part of the same short Assembly bill.

2. THE EVOLUTION OF VEHICLE CODE § 42231 DEMONSTRATES THAT IT WAS NOT MEANT TO LIMIT REFUNDS OF VEHICLE LICENSE FEES

The key ancestor to *Vehicle Code* § 42231 is former *Vehicle Code* § 383.1, enacted as part of Assembly Bill 1259 (Chapter 1250, Statutes of 1945). It was part of bill which clarified certain fees on the transfer of vehicle *registration* and imposed penalties on certain late *registrations*. Its introductory clause read:

> "Whenever application is made by any person for the registration or transfer of *registration* of a vehicle or for any other privilege specified in this [Vehicle] code and the application is accompanied by any fee. . . ." [Emphasis added.]

This language shows that the section was not meant to apply to vehicle license fees.

First, the *license fee* (which is at issue in this action) was and is imposed by the *Revenue and Taxation Code*, not the *Vehicle Code*; therefore, it is not included within the expression "any other privilege specified in this [Vehicle] code." In contrast, the *registration fee* is and was imposed by the *Vehicle Code*. See *California v. Buzard, supra*; *Buzard v. Justice Court, supra*. In context, the fact that payment of a license fee might physically have accompanied an application for registration does not mean that the section restricted a tax imposed by a different code and

for which the other code specified a refund procedure. The fact that the license fee often accompanies payment of registration fee is the only face friendly to the California Supreme Court's *sua sponte* interpretation, out of a Rose Bowl full of unfriendly faces. This is not sound statutory construction. See, *Conroy v. Aniskoff* (March 31, 1993) ____ U.S. ____, 113 S.Ct. 1562, ____, 61 USLW 4301, ____ (Scalia, J. concurring in judgment). A tenable construction has to look at all of the generally accepted principles of interpretation, not just at the principle which superficially supports the California Court's goal of exempting the State of liability for its wrongful acts.

Second, subdivision (d) of the section provided for return of money to the DMV from the state controller if the amount which DMV was to refund had been turned over by the DMV to the state treasury to the credit of the Motor Vehicle Support Fund or the Motor Vehicle Fund. Said funds did not receive money from the vehicle license fee; vehicle license fees went to the Motor Vehicle License Fee Fund. *Revenue and Taxation Code* § 110001.

Third, subdivision (e) was a legislative appropriation to provide the money for refunds of fees:

> "collected under this [Vehicle] code and the procedure herein prescribed shall be deemed a compliance with the requirements of the Political Code of this State in reference to the refund of excessive or erroneous fees or penalties paid to the Department of Motor Vehicles."

It is untenable logic for the section to make an appropriation only for fees imposed by the Vehicle Code if it was also the intention to apply the section to a fee imposed under the *Revenue and Taxation Code*. The reference to the Political Code (now called the Government Code) suggests that the Legislature did not intend to impose tougher restrictions on return of fees under the *Vehicle Code* than the requirements of what is now the Government Code. This analysis is confirmed by the legislative history discussed below.

The only other significant step in the evolution of the statute (its redrafting in 1954 to the present Vehicle Code section) was

advertised as a non-substantive redrafting of the code as demonstrated below.

3. THE LEGISLATIVE HISTORY OF VEHICLE CODE § 42231 AND ITS PREDECESSOR CONFIRM THAT THE LEGISLATURE DID NOT INTEND FOR § 42231 TO RESTRICT THE REFUND OF VEHICLE LICENSE FEES

All fees referred to in the legislative history of *Vehicle Code* § 42231 and its predecessor are fees imposed by the *Vehicle Code*. For instance, the letter from the Director of the Department of Motor Vehicles to then Governor Earl Warren describing the bill and recommending its passage only discussed fees imposed by the *Vehicle Code* on the transfer of registration and penalties for late application for special plates (also covered by the *Vehicle Code*). It said that section 383.1 "enlarges the grounds upon which a refund may be obtained. . . ." The DMV Director also said, "It is assumed that this section means that when the Division of Registration [of the DMV] finds that a fee has been paid in error, they may make the refund without application." The analysis of the Automobile Club of Southern California, upon which the Governor's staff relied, described the procedure as being "consistent with previous Political Code sections relating to refund of fees erroneously collected by other departments." (Appendix A, page 1a) The California Court has turned a provision intended to benefit people who overpaid fees imposed by the *Vehicle Code* into a barrier to the elimination of discrimination against interstate commerce by the *Revenue and Taxation Code*.

The legislative history of the redrafting of former *Vehicle Code* § 383.1 into § 42231 shows the absence of any intent to expand coverage from fees imposed by the *Vehicle Code* to a fee imposed by the *Revenue and Taxation Code*.

4. THE CALIFORNIA COURT'S RELIANCE ON DICTA IN *PIAZZA PROPERTIES, LTD. V. DEPARTMENT OF MOTOR VEHICLES* IS UNTENABLE

The California Court's reliance on *Piazza Properties, Ltd. v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 622, demonstrates the danger of a court *sua sponte* and without notice

relying on novel theories not briefed by the parties. The California Court gave no indication prior to its decision that it was considering relying on the *Vehicle Code* to limit refunds of fees imposed by the *Revenue and Taxation Code*. Had the California Court allowed the adversary process to work, for the class members herein to have a meaningful hearing on the point, it would have been clear to the court that *Piazza* is not on point. The holding of *Piazza* is that a statute of limitations applicable to the agency responsible for collecting a tax is also applicable to the state itself. The court's reference to *Vehicle Code* § 42231 rather than *Revenue and Taxation Code* § 10901 was irrelevant and harmless error because both sections contain a 3-year statute of limitations. The Court neither cited *Revenue and Taxation Code* § 10901 nor explained why it did not apply despite the section specifically saying that it applied to vehicle license fees. The Court's analysis ignored the unambiguous language of § 10901 and made § 10901 surplusage. And surplusages are frowned upon. *City and County of San Francisco v. Farrell* (1989) 209 Cal.App.3d 732, 738.

III

CONCLUSION

In sum, the California Supreme Court has ignored the reasonable and viable claims methods provided by California statute and chosen instead to place an impossible hurdle in the way of victimized taxpayers by making it absolutely economically unfeasible to seek redress for the intentional wrongful acts of the State and its violation of the federal Constitution. Here, the California Court chose a statutory scheme that is clearly not reasonably related to any State interest of such an overriding nature as to overcome the paramount interest of the Supremacy Clause and the enforcement of the Commerce Clause.

The State of California should not be able to escape liability for its violation of the Commerce Clause on the flimsy grounds of alleged non-compliance to a statute that serves no other purpose than to perpetuate the State's illegal unconstitutional activity, and at the same time disregard a State statutory scheme that would clearly serve to benefit justifiable interests of the State in providing for a systematic claim procedure, and that would assure victimized taxpayers appropriate opportunity for redress of the wrongs foisted upon them. It is submitted that the proper statutory scheme applicable here is either that found in *Government Code* § 910, or *Revenue and Taxation Code* § 10901 both of which were fully and completely conformed to by petitioner Woosley on behalf of the class. Any other pretext asserted by the State to deny this class action for unconstitutional taxation is an untenable State ground.

DATED: May 3, 1993

Respectfully submitted,

By: /s/ Frear Stephen Schmid
Counsel for Amicus Curiae
Association of Calfornia
Car Clubs

APPENDIX A

J. Allen Davis, Esq.
Automobile Club of Southern California
Los Angeles, California

EXPLANATION OF ASSEMBLY BILL NO. 1259
(As amended April 9, 1945)

This bill relates to the fees imposed for transfer of ownership or any interest in a motor vehicle. The amendments clarify and simplify the statements in reference to payment of transfer fees. For example, as amended only one dollar transfer fee will be payable in the event an application is presented showing a transfer by both the owner and legal owner.

Another amendment provides that the penalty for delinquency in respect to any transfer shall be $1.00 and shall apply only to the last transfer. This will simplify the work of clerks of the department in determining the penalty.

The bill adds a new section to the Vehicle Code, 383.1, to set forth a procedure to be followed in respect to refund of fees erroneously collected and not legally due. The procedure is consistent with previous Political Code sections relating to refund of fees erroneously collected by other departments.

/s/ J. Allen Davis

Supreme Court, U.S.
FILED
MAY 1 1 1993
OFFICE OF THE CLERK

No. 92-1605

IN THE SUPREME COURT

Of The

UNITED STATES

October Term, 1992

PATRICK G. WOOSLEY,
on behalf of himself and all others
similarly situated,
Petitioner, vs.

STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES AND STATE BOARD OF CONTROL,
agencies of said State,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF CALIFORNIA

REPLY TO BRIEF OF RESPONDENTS STATE OF CALIFORNIA et al., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *sua sponte* overruling uniform California authority approving class claims for refund of taxes, did the California Supreme Court create an untenable and inadequate state ground for denying members of Petitioner Class herein the protection of this Court's settled anti-discrimination precedent?

2. Where a State intentionally discriminates against interstate commerce, does the Due Process Clause permit retroactive application of a new procedural condition to block relief from facial discrimination?

3. Did the California Court's prohibition of class claims for refund (1) deprive the Petitioner Class of due process by (a) denying them meaningful backward looking relief and (2) violate the principles of *Felder* v. *Casey* 487 U.S. 131 (1988) because the prohibition required them to seek individual redress from an administrative agency that was, pursuant to the State's Constitution, expressly prohibited from granting the relief sought?

4. Is it an undue burden on interstate commerce for a State to collect a fee which it knows to discriminate against interstate commerce and require the targets of the discrimination to file individual claims for refund, particularly to an agency which does not have the power to rule a statute unconstitutional?

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REPLY BRIEF

I. RETROACTIVE IMPOSITION OF A PROHIBITION AGAINST CLASS CLAIMS FOR REFUND IS NOT AUTHORIZED BY MCKESSON

The Brief Of Respondents ... In Opposition To Petition For Writ Of Certiorari ("Opposition" or "Opp.") is confused about the allowable extent and the allowable timing of procedural requirements under *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990). For convenience, DMV (Dept. of Motor Vehicles) is used herein for all respondents.

A. The California Supreme Court Exceeded McKesson's Limits On Procedural Barriers

As a frame of reference, *McKesson's* principal holding is,

> To satisfy the requirements of the Due Process Clause, ... the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, [footnote] but also a "clear and certain remedy" [citation] for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." (*Id.* at 39; See also, pages 40 and 51.)

McKesson also holds that "serious economic and administrative dislocation" does not justify a refusal to provide relief. (*Id.* at 49-51, especially n. 35.) In response to the Florida Supreme Court's equity rationale, this Court ruled,

> This ... bespeaks a concern that a state's obligation to provide refunds for what later turns out to be an unconstitutional tax would undermine the State's ability to engage in sound fiscal planning. (*Id.* at 44.)

and listed allowable procedural requirements. Opposition quotes some (at p. 9) but omits the following:

> [E]xecute any refunds on a reasonable installment basis; ... refrain from collecting taxes pursuant to a scheme that has been declared invalid ... pending further review of such a declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. (*Id.* at 45.)

McKesson's use of "predict with greater accuracy the availability of undisputed treasury funds," "unpredictable interim revenue shortfalls against which the State cannot easily prepare" and "installment plans" demonstrate that allowable procedural requirements must be reasonable[1] and be aimed at avoiding surprise or *temporary* disruptions. As indicated at Petition for Writ of Certiorari ("Petition" or "Pet.") pages 21-22, DMV was not surprised. At each stage of the litigation -- from the trial court to the Court of Appeal and to the California Supreme Court -- the discriminatory tax was found unconstitutional based on long-settled precedent. And yet, DMV continued to collect the discriminatory tax throughout the 15 years of this litigation. DMV only started the process of eliminating discrimination for the future in 1991 and is still discriminating on some vehicles. Furthermore, no credible reason has been advanced why requiring three million individual claims would further any valid purpose better than one class claim. Re the claim contents argument (Opp. at 12, 14-15), the Court of Appeal held that, "[T]he claim and amended claim filed by plaintiff Woosley are probably far more precise and specific than the average taxpayer refund claim." (App. at 84a, all "App." cites are to the Appendices of the Petition.) The California Supreme Court ("California Court") did not grant review of this ruling.

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[1]See Opposition page 14, line 6.

B. Opposition Misconceives Timing Limitations On Impositions of Procedural Barriers, And The California's Court's Contention That It Was Interpreting Existing Law Is Untenable

DMV argues that imposition of procedural barriers need not be timely (Opp. at 10), but on the next page quotes a passage requiring timely imposition. (*McKesson*, at 24, n. 4.)[2]

Despite Opposition at 11, the California Court's ruling that there existed in 1977 a requirement for individual claims ("the Ruling") is an untenable interpretation of state law threatening to deprive the Class of federal rights.[3] Generally, state law interpretations do not raise federal issues, but the Ruling does here because it violates Due Process, unreasonably burdens commerce, and is an untenable state ground for denying independent federal rights.[4]

Contrary to Opposition at page 9, *Osborne v. Ohio*, 495 U.S. 103, 124 (1990) underscores rather than undermines the untenability of the Ruling. The paragraph from which DMV quotes found Ohio was relying upon an untenable state ground and said,

> As Justice Holmes warned us years ago, "[W]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. [Citation.]" (*Id.* at 125.)

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[2]Also, see *McKesson*, 496 U.S. at 45, n. 28:

> [Citation] (refund claim could be barred if there was "any valid local [limitations] law in force when the claim was filed") ....

[3]Citation at Opposition page 11 to Appendix page 45a is inappropriate; use taxes are no longer at issue herein. (Pet. at 3.)

[4]Not all questionable state law interpretations raise federal issues; California Court's use tax interpretation, which saved over $500 million, is not challenged herein. (See App. at 74a-82a; 277a-281a.)

The Class' federal claims were plainly and reasonably made. (See, App. at 82a-87a.) DMV's quotation is simply a characterization of one argument, not the sole definition of an untenable state ground.

II. DUE PROCESS BARS STATES FROM PROHIBITING CLASS CLAIMS BY SYSTEMATICALLY OVERCHARGED CLASSES, BUT EVEN IF CLASS CLAIMS COULD BE PROHIBITED, DUE PROCESS REQUIRES PROSPECTIVE-ONLY APPLICATION

Opposition at 16-17 extrapolates to the false premise that States can deny class relief even where class relief is the only way to provide due process.[5] At pages 19-22, Petition sets out the proper analysis under the teachings of *Mathews v. Eldridge*, 424 U.S. 319 (1976). DMV's prospectivity discussion (Opp. at 12-13) has several flaws. It discusses abstention in a vacuum, where federal rights were not impinged. While state requirements are generally state law questions, the requirements must satisfy federal standards when they impinge on federal rights, as here.

III. OPPOSITION ATTEMPTS TO MISLEAD

Opposition attempts to create numerous illusions to confuse the case. First, DMV suggests that the Petition is moot because the California Court ruled in Woosley's favor as an individual (Opp. at 4, 6, 13.), but he is also the certified representative of a class ("the Class," Pet. at 1). The Class' rights have been trampled, not Woosley's.

Second, DMV argued that its clerks could not be expected to know that they were violating the Commerce Clause (Opp. at 3); however, DMV's management knew

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[5]Federal income tax cases cited (at Opp. 10, n. 5) are not persuasive on the federal Constitution's requirements for States. A class income tax proceeding would have to deal with all income and expenses of the class members, an impossible task. (See, App. at 287a, n. 1.) Also, apparently due process was not argued.

(App. at 130a-133a) and lobbied the Legislature repeatedly for change, and was repeatedly rebuffed. (App. at 138a.)

Third, DMV misleadingly argued (Opp. at 5) that because it briefed the California Constitution, the Class was not surprised by the Ruling. The Class was surprised by the court's *sua sponte* and untenable definition of "agent" as used in Vehicle Code section 42231 to exclude a class representative as agent. (See App. J herewith for Vehicle Code section 383.1, the predecessor to section 42231.) If there were to be a valid procedural prerequisite to the protection of a federal right, it has to be reasonably apparent at the time it had to be satisfied.

Fourth, DMV argues (Opp. at 10) that Woosley's win proves that procedural requirements did not thwart constitutional rights. The reason that Woosley's rights were not thwarted was because he expected litigation costs to be shared with the Class, the only reasonable interpretation of the law at that time. It is not reasonable to assume that he would have protected his rights, in face of procedural precedent to the contrary, in search of a pyrrhic victory. It is also not reasonable for an individual to spend tens of thousands for costs, or for a law firm to conscientiously advance litigation for over 15 years in pursuit of an individual entitlement averaging about $100 ($2000 in Woosley's case).

Prospective vehicle purchasers had the alternative of (1) purchasing out-of-state vehicles with high fees, filing individual refund claims, and suing,[6] or (2) purchasing vehicles originally sold new in California with low fees. Most purchasers would be enticed by this discrimination toward

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[6]This is an enormous burden: the Superior Court filing fee is over $100 and the Court of Appeal filing fee is $200, plus other costs and fees -- all for a typical $80-$100 intentional overcharge. The trial court implicitly found the trial court Lodestar was at least a million dollars. (App. at 268a, 95a.)

purchasing California vehicles, achieving the very objective this Court's settled precedent prohibits. (This California vs. out-of-state distinction has nothing to do with smog requirements.)

Fifth, DMV invalidly relies on Tax Injunction Act cases to show that refund procedures satisfy due process. (Opp. at 16.) The issue under that act is whether procedures are sufficient to allow state courts to monopolize litigation of state taxes, not whether the state courts are exempt from the Constitution.[7]

Sixth, now that DMV's scare tactics have elicited the Ruling, DMV whitewashes those tactics. (Opp. at 5.) DMV's petition to the California Court seeking its review (at 3, including a note) argued:

> The questions presented by this case are highly significant questions of law that are very important to the State of California. The impact of the case on the budgets of cities, counties and the state itself should the decision herein not be reversed is estimated at more than one *billion* dollars (approximately $1,356,000,000). The amount subject to refund for the threatened 16-year refund period ... is estimated to be *$556[8] million in use tax and as much as $800 million in vehicle license fees. The total estimated liability is $1,356,000,000. By comparison, the fiscal cost to the State of California for the 1989 San Fran-

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[7]Further, *Waldron v. Collins* 788 F.2d 736 (11th Cir.1986), distinguished *Garrett v. Bamford*, 538 F.2d 63 (3rd Cir.1976) (absence of class procedure *justified federal court litigation, taxes challenged as systematically infringing federal rights*). Here, important Commerce Clause rights are being systematically infringed.

[8]Substantially all of this $556 million is no longer at issue because the California Court found on adequate state grounds that use taxes after 1976 were correct. (For that reason, this estimate is marked with an * each time it appears.) If DMV's estimates were correct, only the $800 million would be at issue before this Court.

> cisco Earthquake, which led to the one-quarter percent increase in the sales and use tax rate ..., is estimated to be $800 million. (Emphasis in original.)

DMV's continued hammering of "$1,356,000,000" after the California Court agreed to a review belies argument that it was being argued to encourage exercise of discretionary review. DMV's Opening Brief On The Merits (at 2), framed one question:

> (b) ... If it is a correct interpretation of the statute, does the fact that it is not promulgated as a regulation ... necessitate the refund of *$556 million in use taxes?

and at page 3 it argued:

> This case involves a class action challenge to the state's administrative interpretation of statutes relating to the Vehicle License Fee (VLF) and use tax. The amount subject to refund for the threatened and still-running period ... currently is estimated to be approximately *$556 million in use tax and as much as $800 million in vehicle license fees. The total current estimated liability is $1,356,000,000.[9]

DMV coordinated with an *amicus* brief of the County Supervisors Association and ten counties -- Los Angeles,

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[9]DMV's Reply Brief repeated the unsupported $1.4 billion estimate (at 28, n. 9) and DMV's Supplemental Brief Re Class Action ..., at 20, increased the unsupported estimate to $1.5 billion.

> Imposition of the class action remedy by the courts has extended the period of litigation to 14 years, has resulted in a massive growth in the class as designated by the trial court, and has exposed the public fisc both to an aggregate potential liability estimated to exceed $1.5 billion and to potential cost of class claim administration now approaching an estimated $100 million. This is not a situation where convenience and efficiency is being served by the class action process.

San Francisco, Butte, Contra Costa, Del Norte, Kern, Madera, Mariposa, Shasta, and Solano -- which argued (on p. 1):

> In entering and affirming a judgment in favor of respondent [Class] the courts below allowed a refund which appellants [DMV] estimate at $1.356 billion, approximately $433 million of which will be the responsibility of the counties. The fiscal impact of such a refund would be devastating. *Consequently procedural prerequisites to litigation should be strictly enforced.* (Emphasis added.)

DMV's argument (Opp. at 5) that the amounts were being argued to challenge the propriety of class certification, is also unconvincing. As shown by the Superior Court's findings of fact (App. at 231a-262a, accepted by the California Court App. at 5a), the class size increases the relative efficiency of class mechanisms compared to individual mechanisms.

The California Court signaled that it understood DMV's message. It wrote,

> Finally, we decide whether the class claim filed in this case was authorized by statute. The state estimates that the current amount of the refund of vehicle license fees and use taxes under the judgment appealed from exceeds $1 billion. (App. at 2a.)

IV. THIS ACTION IS FINAL WITHIN 28 U.S.C. §1257's MEANING BECAUSE THE SUPERIOR COURT IS POWERLESS TO REDRESS THE CALIFORNIA COURT'S DEPRIVATION OF THE CLASS' FEDERAL RIGHTS

DMV argues that the Petition is premature -- that it lacks the finality required by 28 U.S.C. §1257 (Opp. at 6, n. 3.); simply stated, DMV is wrong. DMV would, no doubt, be quick to argue that the Petition was untimely if the Class

had waited until after the Superior Court implemented the California Court's directions.

The California Court's judgment is "subject to no review or correction in any other state tribunal." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945). It is the "final word of a final court." *Id.*

The federal matters of which the Class complains have been finally adjudicated. The tasks remaining in the trial court cannot have the slightest impact on the federal determinations of the California Court that form the basis of the Petition. The California Court has determined that no former member of the certified class who failed to make an individual claim can recover in this action. This ruling is final, and is susceptible to no further interpretation in the lower state courts.

The remaining task of the California trial court is limited to a head count of those prescient taxpayers, schooled in Commerce Clause precedent, who recognized the unconstitutionality and filed a refund claim on that ground. If the number is insufficient, the action cannot remain a class action. No party has suggested that there is anyone other than Woosley meeting the criteria. (See Pet. at 5.) However, undoubtedly the vast majority of the Class did not file and they have no further presence in the state court proceeding. Those few that remain in have no federal issues.

The California Court has determined that even though the state's constitution expressly forbids agencies from determining any statute unconstitutional (Cal. Const. art. III, §3.5), nonetheless the failure of taxpayers to seek individual redress from these agencies on the forbidden constitutional grounds bars their participation in the previously certified class. This determination also is final, and is susceptible to no further state review. The possibility that some former class members may be able to file another action

does not deprive *this action* of finality, all that is required by section 1257.

The California Court has determined that no notice need be given to the several million class members who have now been eliminated from the previously certified class, even though the statute of limitations on their individual claims is running. (App. at 49a-50a.) This determination too is final, and brooks no interference from the trial court.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975) teaches that where, as here, there are further proceedings yet to occur in the state court, but the federal issues have been conclusively determined and the outcome of the further state proceedings cannot moot them, the judgment of the highest state court is deemed final. *(Cox*, 420 U.S. at 479.)

The federal determinations of the California Court which form the basis of the Petition will survive and require decision regardless of the outcome of the limited future state court proceedings. (Compare *Cox*, 420 U.S. at 480.)

Thus, respondents' finality argument is without merit.

Respectfully submitted.

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APPENDIX J
Vehicle Code Section 383.1 (1945)

383.1. Procedure for Refund of Fees. (a) Whenever application is made by any person for the registration or transfer of registration of a vehicle or for any other privilege specified in this code and such application is accompanied by any fee which is excessive or not legally due, or whenever the department in consequence of any error either of fact or of law as to the proper amount of any fee or any penalty thereon or as to the necessity of obtaining a registration, transfer of registration or other privilege under this code collects any fee or penalty which is excessive, erroneous or not legally due, the person who has paid any such erroneous or excessive fee or penalty, or his agent on his behalf, may apply for and receive a refund of the amount thereof as provided in this section.

(b) The applicant may within not more than one year from the date of payment of such erroneous or excessive fee or penalty present an application in writing to the department identifying the payment made and stating the grounds upon which it is claimed that such payment was excessive or erroneous.

(c) Whenever any fee or penalty subject to refund under the provisions of this section has not been paid into the State treasury, the department shall refund the fee or penalty.

(d) Whenever any fee or penalty subject to refund under this section has been paid into the state treasury to the credit, in whole or in part, of the Motor Vehicle Support Fund or of the Motor Vehicle Fund, the department shall prepare a claim setting forth the facts pertaining to the fee or penalty sought to be refunded and, upon approval of the claim by the Director of Finance, the Controller shall draw his warrant upon the fund or funds to which the fee or penalty was credited.

(e) This section shall be effective as a legislative appropriation of any and all amounts necessary to refund and repay any excessive or erroneous fees and penalties collected under this code and the procedure herein prescribed shall be deemed a compliance with the requirements of the Political Code of this State in reference to the refund of excessive or erroneous fees or penalties paid to the Department of Motor Vehicles.

(f) The provisions of this section shall also apply in the event application has been made and fees have been paid for the registration of a vehicle which is not in fact operated upon the highways of this State, but in such event application for refund shall be made within 60 days after the date such fees are paid to the department.

(Statutes of California 1945, chapter 1250, section 3.)